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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE PROCTER & GAMBLE MANUFACTURING COMPANY,
Petitioner,

vs.

DENNIS FISHER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a finding of employer discrimination can be properly based on the effects of pre-Act hiring, time-barred promotion decisions, and a *bona fide* seniority system, despite this Court's decisions in *Teamsters* v. *United States*, 431 U.S. 324, and in *United Air Lines* v. *Evans*, 431 U.S. 553.

2. Whether the court below could properly find discrimination by ignoring the inadequate number of promotion decisions and the proper qualifications of the relevant population and relying on statistics derived from a "snapshot" view of job category incumbents at a particular point in time, contrary to the decisions of this Court in *Hazelwood School District* v. *United States*, 433 U.S. 299, *Griggs* v. *Duke Power Co.*, 401 U.S. 424, and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, and in conflict with the decision of the Seventh Circuit in *Movement for Opportunity & Equality* v. *General Motors Corp.*, 622 F.2d 1235 (7th Cir. 1980), and other cases.

3. Whether the decision below defeats the objective of equal employment opportunity by invalidating promotion devices which are designed to ameliorate the impact of seniority.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, The Procter & Gamble Manufacturing Company (hereinafter "Company") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on May 29, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 613 F.2d 527. It is reproduced in Appendix A, *infra*, pp. 1a-35a.

The Findings of Fact and Conclusions of Law of the District Court for the Northern District of Texas dated April 20, 1977 are not officially reported, but are reported at 14 EPD ¶7662. A copy is reproduced in Appendix B, *infra*, pp. 37a-52a. The Judgment of the district court is reproduced in Appendix C, *infra*, pp. 53a-54a. The District Court's Order Amending Findings of Fact and Conclusions of Law dated May 6, 1977, officially unreported, is reproduced in Appendix D, *infra*, p. 55a. The District Court's Amended Judgment dated May 19, 1977, also officially unreported, is reproduced in Appendix E, *infra*, pp. 57a-58a. The District Court's Order Providing for an Affirmative Action Plan in Defendant's Dallas Plant dated May 31, 1977, also officially unreported, is reproduced in Appendix F, *infra*, pp. 59a-68a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 12, 1980. Appendix G, *infra*, pp. 69a-70a. A petition for rehearing and suggestion for rehearing en banc was denied on May 29, 1980. Appendix H, *infra*, pp. 71a-72a; 618 F.2d 1389. By order of this Court, dated August 14, 1980, the petitioner was granted an extension of time in which to file this petition, up to September 26, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964 (hereinafter "Title VII"), 42 U.S.C. § 2000e *et seq.*, specifically Section 703(h) thereof (42 U.S.C. § 2000e—2(h))

and Section 706(e) thereof (42 U.S.C. § 2000e—5(e)). Additionally, the Civil Rights Act of 1866, 42 U.S.C. § 1981. Sections 703(h), 706(e) of Title VII and Section 1981 are set forth in their entirety in Appendix I, *infra*, pp. 73a-74a.

STATEMENT

This case is a class action under Title VII of the Civil Rights Act of 1964. It involves the seniority system and promotion practices of the Dallas, Texas plant of The Procter & Gamble Manufacturing Company. The basic issue is whether despite this Court's holdings in *Teamsters* v. *United States*, 431 U.S. 324, and *United Air Lines* v. *Evans*, 431 U.S. 553, a conclusive showing of discrimination can be founded upon only a snapshot statistical showing which ignores the combined effects of a *bona fide* seniority system, pre-Act hiring decisions, and time-barred promotion decisions, and which incorporates far too few promotional decisions to support a reliable finding.

The evidence before the district court may be summarized as follows:[1]

The Dallas plant, which produces and distributes food, soap, and synthetic detergents, has a current work force of over 500 employees. Since at least 1972, the Dallas plant has had an active affirmative action program. The work force as a whole has gone from .5% (3 of 549) black employees in 1966 to 14.7% (74 of

[1] Citations to the record below are either to the Joint Appendix before the court of appeals, cited J.A. , or to the Joint Appendix exhibit volumes, cited J.A.X. .

505) in 1977; as of January 1, 1977,[2] 35.5% of employees with seniority dates after July 1, 1966 were black. (Approximately 12.8% of the total work force in the Dallas-Fort Worth Standard Metropolitan Statistical Area is black. Finding of Fact 17, App. B at 40a; 613 F.2d at 535 n.8, App. A at 8a n.8.)

Turnover at the plant is low, and, as the figures above would indicate, there is no contention of hiring discrimination during the relevant years.[3] The present controversy between the parties relates entirely to promotions among the ranks of existing employees.

For most positions at the plant, promotion is based upon seniority, pursuant to the provisions of a labor contract. The court of appeals found the Company's plant-wide seniority system to be neutral in operation and *bona fide* within the meaning of *Teamsters* v. *United States*, 431 U.S. 324. All non-management openings within the plant are posted plant-wide and for most jobs, plant-wide seniority is the sole effective criterion of selection among the bidders.

For certain job categories which require special qualifications, the most senior qualified bidder is chosen according to a process termed "total assessment." There are three non-management job categories which are filled in this way: (1) maintenance

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[2] January 1, 1977 was the date established as the cutoff point for evidence to be considered at the trial, which began January 11, 1977.

[3] The court of appeals below found specifically that hiring practices had not been "joined or litigated" in the case. (613 F.2d at 541, App. A at 22a.)

technician (mechanic); (2) lab analyst; and (3) high level operator. For a fourth job category—manufacturing clerical—total assessment is not used but bidders do take the Aptitude Form C-M test.

Total assessment operates as a qualification on seniority rights. In order to qualify for promotion, the senior bidding employee must achieve an "acceptable" rating. Thus, the job bidder with the greatest plant-wide seniority and with at least an "acceptable" total assessment profile is selected to fill the vacancy. (J.A. 341, 679.)[4]

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[4] As is discussed *infra*, the total assessment system was implemented for the various jobs at different times within the statutory period. Thus the number of promotion decisions affected by total assessment is less than the total number of promotion decisions made within the statutory period. See nn. 6 & 7, *infra*.

Total assessment was developed by professional industrial psychologists, and implemented by the Company in response to the 1966 EEOC Guidelines on Employment Testing Procedures (hereinafter "1966 EEOC Guidelines", J.A.X. 1659) which specifically advocated use of total personnel assessment (J.A. 653.) In practice, total assessment is a uniformly administered, systematic and comprehensive way of compiling and evaluating evidence about a bidder with respect to "what counts" factors, which are related to performance on the job for which the employee has bid. (J.A. 340-41, 651-52.) "What counts" criteria are established for each position for which total assessment is used.

Where total assessment is utilized, the bidder for a non-management job takes one or more professionally developed tests. For mechanic positions, the bidder takes the Aptitude Form M-A test. (J.A.X. 1328-43.) For lab analyst positions, the

(footnote continued)

Total assessment has two impacts. *First*, it has a positive impact on less senior bidders who are considered for promotion when more senior bidders do not achieve acceptable ratings. *Second*, it has a negative impact on more senior bidders who are "bypassed"—*i.e.*, those with enough seniority to receive the promotion but who were not judged to be acceptable candidates.

As of the date of trial, all of the non-management employees then employed at the plant whose seniority dates predated July 1, 1966, were white. Thus, there were 239 white employees out of a total of 436 employees who had more seniority than the most senior black employee. Consequently, it was predominantly white bidders who were disqualified or bypassed (*see* Finding of Fact 19, App. B at 40a; J.A.X. 1269-77; D. Ex. 14, J.A.X. 1278.)

(footnote continues)

bidder takes the Aptitude Form C-M test. (J.A.X. 1344-54.) For high level operator positions, the bidder takes the Aptitude Form M-A test (J.A.X. 1328-43), the Production Control test (PCT) (J.A.X. 1355-73), and a "Form N" arithmetic test. There are no specified minimum scores for any of the tests (J.A. 408-09, 416-17), but rather they are scored on the basis of a four-category scale. (J.A. 408-09.) When a test is used as a part of the overall total assessment process, it is used as only one of the pieces of information gathered about the bidder in the "what counts" areas. (J.A. 400, 409-10.) These tests were developed in-house by Procter & Gamble professional industrial psychologists and the trial court found all of them to be "professionally developed" within the meaning of 42 U.S.C. § 2000e-2(h) (except the C-M test, as it is used apart from total assessment in selection of employees for manufacturing clerical positions). (Conclusion of Law 18, App. B at 50a.)

Between September 11, 1970,[5] and January 1, 1977 (the cutoff date for the evidence at trial), 19 mechanic selections were made. For these selections, 79 white employees (90.8%) and 8 black employees (9.2%) were bypassed.[6] (J.A.X. 1393-1400.) In this period, only two lab analyst selections were made; 5 white employees (83.3%) and one black employee (16.6%) were bypassed. (J.A.X. 1403-06.)[7] For manufacturing clerical jobs, only 2 selections were made in the period and no black employee with more seniority than the employee selected was ever bypassed. (J.A.X. 1407.)

The greatest number of vacancies occurred in high level operator jobs where 34 vacancies were filled after implementation of the total assessment system for these jobs. Of these vacancies, 21 were filled by whites (62%) and 12 by blacks (35%) a ratio

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[5] The respondent filed his charge with the EEOC on March 10, 1971. The statutory time period runs from the 180th day prior to that date, *i.e.*, September 11, 1970. *See* § 706(e) of Title VII, as amended.

[6] Total assessment was not used for selection for mechanic positions until February, 1973. (J.A.X. 1393.) Before that time, selections were made on the basis of plant-wide seniority and valid qualifying tests. (*See* fn. 4, p. 5.) Since that time, there have been 15 mechanic jobs awarded, one (6.7%) of which was awarded to a black (compare J.A.X. 1398-1400 with Finding of Fact 42, App. B at 44a.) For those 15 selections, 47 employees were bypassed, only 2 (4.2%) of whom were black. Had total assessment not been utilized, the one black awarded a mechanic position would not have been selected since he was not the senior bidder. (J.A.X. 1398.)

[7] Total assessment was used with respect to only one lab analyst selection. (J.A.X. 1403-06; Finding of Fact 45, App. B at 44a.)

of black employees to white employees which far exceeds black representation in the work force. (J.A.X. 1387-89.)[8]

Promotions to management from non-management jobs are based on a type of total assessment, which incorporates the use of the Form PM test, and which is quite different from that used for non-management promotions. (Amended Finding of Fact 22, App. D at 55a.) Since September 11, 1970, 6 persons have been promoted to management positions, one of whom was black. (J.A.X. 1412-13.)

Decision of the District Court

The case was tried before the district court below as a class action on behalf of all actual black employees and all future black employees of the Dallas plant. In a decision rendered *before* this Court's decisions in *Teamsters* (431 U.S. 324) and *Evans* (431 U.S. 553), the court found a pattern or practice of discriminatory promotions based on the advantages which the plant's seniority system apparently gave to white employees. First, the court concluded that the seniority system was not "*bona fide*", despite the fact that it was plant-wide and neutral in operation, because it operated to freeze the effects of past discriminaton. All results of that system were therefore suspect. The district court relied upon the then-current job category figures which, as of the date of the trial, showed disproportionately low numbers of

[8] One position was filled by a member of another minority group.

blacks in management and certain non-management positions. The district court went on to find that the total assessment program was invalid because blacks were underrepresented among the managerial personnel who applied the program. (Conclusion of Law 21, App. B at 50a.)[9]

On the testing issues, the court found discrimination in the use of two of the tests. The Form PM test used for promotion to management positions was held not to be a valid test unless it was used in conjunction with a valid total assessment program, because it had content validity only with respect to certain aspects of the managerial functions. The Form C-M test, insofar as it was used for promotion to manufacturing clerical positions, was found to be not "professionally developed" or properly validated, because of the court's conclusion that test results did not show that it was valid for both black and white employees. The court gave judicial approval to the use of Form C-M insofar as it was used for promotion to lab analyst positions, and to the use of all other tests in issue in this case. (*See* fn. 4, *supra*, p. 5.)

Moreover, the court found no discrimination in promotion to high level operator positions despite the use of total assessment and three tests.

Finally, the district court found discrimination in promotion to security guard positions, even though

[9] The court's conclusion applied to the type of total assessment used for promotions to management as well as to the type used for non-management promotions, although (1) total assessment for promotions to management was a different process, and (2) it was never litigated before the district court.

such promotions were made solely on the basis of plant-wide seniority.

Decision of the Court of Appeals

Shortly *after* the district court decision, this Court rendered its decision in *Teamsters* v. *United States*, 431 U.S. 324. Based on *Teamsters*, the court of appeals rejected the district court's conclusion that the Company's seniority system was not *bona fide*, but upheld the lower court's finding of a *prima facie* case, and many of the ultimate findings, of discrimination. The court of appeals did so by characterizing the district court's holding as based upon two alternative supports: first, the finding that the seniority system was not *bona fide*, and second, the disparate impact of the Company's promotion system on blacks. The court said (613 F.2d at 543, App. A at 26a-27a):

> The district court found that the Company had committed present and continuing violations. This conclusion was premised not only on the court's finding that the seniority system was not bona fide, but on its finding that the Company engaged in active discrimination in granting promotions to certain positions. Because the record supports the latter finding, the district court's erroneous determination as to the bona fide nature of the seniority system does not affect the outcome.
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> . . .
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> . . . We find ample record evidence to demonstrate the disparate impact of Company promotion policies. As noted, while blacks comprise

> 14.7% of the total work force, they are marked by their conspicuous presence in the "lower echelons" of the employee hierarchy.... When this action was filed, one of the sixty-three company managers was black, none of the twenty-two lab analysts was black and none of the security guards was black. At the time of judgment, one of twenty-nine clerical workers was black, and one of seventy-six mechanics at the plant was black. [Citations omitted.]

Relying solely upon these snapshot figures showing an apparent underrepresentation of blacks in certain positions on different dates, the court of appeals stated that the burden of rebutting this showing was on the Company. To the extent that the Company maintained that general population figures were an inappropriate comparison because of special skills required, the "burden of proving lack of qualifications [in the general population] is on the Company." (613 F.2d at 544, App. A at 28a.) Likewise, it was the Company's burden to explain the racial disparity by proving the "job relatedness" of the two company promotional practices found objectionable by the district court: (a) the two qualifying tests, and (b) the total assessment program.

In upholding the district court's findings with respect to both the tests and the total assessment program, the court of appeals began by noting that the showing of disparate impact placed the burden of justifying the practices on the Company. It affirmed the district court's conclusion that the C-M test for manufacturing clerical promotions and the PM test for promotions to management had not been properly

validated and thus were not "professionally developed tests" within the meaning of Section 703(h) of Title VII. (Findings of Fact 61-64, App. B at 47a-48a.)[10] The court concluded that the Company had not carried its burden with respect to total assessment because "subjective evaluations by all white supervisors provide a ready mechanism for discrimination." (613 F.2d at 546, App. A at 31a.)

The court also upheld the district court's findings of discrimination in promotion to security guard positions, finding that the Company had failed to explain the disproportionate underrepresentation of blacks in the job, despite the fact that all security guard promotions were based on seniority alone. (613 F.2d at 546 n.36, App. A at 32a n.36.)

Reasons For Granting The Writ

1. *Conflict with Teamsters and Evans*

By basing a *prima facie* finding of discrimination on employment figures which reflected the effects of pre-Act hiring, time-barred promotion decisions, and a *bona fide* seniority system, the court below placed itself in direct conflict with this Court's decisions in *Teamsters* v. *United States*, 431 U.S. 324, and

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[10] Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), provides in pertinent part that it shall not be an unlawful employment practice "for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."

in *United Air Lines* v. *Evans*, 431 U.S. 553, and undermined the protections for *bona fide* seniority erected by Congress and affirmed by *Teamsters*.

In Section 703, Congress provided in clear language that racially neutral, *bona fide* seniority systems would remain permissible under Title VII.[11]

In *Teamsters*, this Court held that the "unmistakable purpose of Section 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII." (431 U.S. at 352.) Section 703(h) immunizes a racially neutral, *bona fide* seniority system, even where the seniority system has the incidental effect of perpetuating the impact of racial discrimination prior to the enactment of the Civil Rights Act. (431 U.S. at 348 n.30.) Moreover, in the *Evans* case, this Court extended its holding in *Teamsters* to immunize a seniority system "even though it perpetuates post-Act discrimination that has not been the subject of a timely charge by the discriminatee." *Evans*, *supra*, paraphrased in *Teamsters*, *supra*, 431 U.S. at 348 n.30. *See also California Brewers Association* v. *Bryant*, 444 U.S. 598.

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[11] "[I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system, provided that such differences are not the result of an intention to discriminate because of race . . . or national origin. . . ."

42 U.S.C. § 2000e-2(h).

Constrained to hold that the Company's seniority system was *bona fide* by *Teamsters*,[12] the court below attempted nonetheless to preserve the district court's finding of discrimination. The court characterized *Teamsters* as affecting this case only with respect to the question whether pre-Act practices or results would constitute relevant evidence. It purported to find active, present discrimination apart from the operation of the seniority system. To do so, the court, completely ignoring *Evans*, relied on incumbency statistics which reflected the effects of pre-Act and time-barred hiring and promotion decisions as well as the operation of the *bona fide* seniority system itself. The court of appeals ignored *Evans*, and chopped *Teamsters* in half by holding that while the Company's seniority system was *bona fide*, the results of its operation were conclusive proof of discrimination.

2. *Conflict with this Court's Decisions in Hazelwood, Griggs, and Moody with Respect to the Use of Statistics*

To construct a conclusive showing of discrimination in this case, the court of appeals ignored this Court's guidance on statistical treatment of qualifications, adverse impact, and sample size, as well as seniority. The conflict with the precedents on these issues is clear when attention is focused on the group allegedly hurt by the Company's promotion practices—*i.e.*, those persons who qualified for promotion based on seniority but who were "bypassed" for other reasons.

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[12] *See also James* v. *Stockham Valves & Fittings Co.*, 559 F.2d 310, 347-53 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034.

A. The court below failed to face the issue of proper qualifications in identifying those eligible for promotion, as this Court's decision in *Hazelwood School District* v. *United States*, 433 U.S. 299, requires. In *Hazelwood*, the trial court had based a finding of a *prima facie* case of discrimination upon a comparison between the percentage of blacks among teachers in defendant school system with the percentage of blacks in the student population. This Court held that the district court had "fundamentally misconceived the role of statistics in employment discrimination cases." (433 U.S. at 308.) The Court held in *Hazelwood* that the trial court should employ a statistical comparision well suited to the particular question under consideration—in that case, a comparison "between the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market." (433 U.S. at 308 (footnote omitted).) *See also Castaneda* v. *Partida*, 430 U.S. 482.

In the current case, a basic qualification for promotion of a person in petitioner's work force is the amount of seniority which that person has acquired. Thus, under *Hazelwood*, the proper approach of the district court in the current case should have been to compare the racial composition of those persons receiving promotions with the racial composition of those persons possessing sufficient seniority to have been realistically eligible for promotion. There is no indication that the district court made this comparison; insofar as the district court did compare the experience of blacks and whites with roughly comparable seniority, it specifically found that for non-

management employees with seniority dates after July 1, 1966, blacks averaged more gross earnings in 1976 than whites. (Amended Finding of Fact 52, App. D at 55a.) Both courts below have failed to make the appropriate comparison in deciding that there was adverse impact.

B. There is no adverse impact on blacks from the practices which the courts below have held invalid. Finding an adverse impact which results from the challenged practices is the essential first step in inferring discrimination. The uniform teaching of this Court, and of courts of appeals, is that a selection procedure must have an overall adverse impact on minorities before the procedure is found to be illegal, and before it is necessary to assess the impact of individual components of the procedure. *See Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425; *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 426; *Friend* v. *Leidinger*, 588 F.2d 61, 66 (4th Cir. 1978).

For promotions to the job positions at the Dallas plant where seniority was a primary factor there is no adverse impact on blacks, with respect either to the incidence of senior employees being bypassed or to actual selections.

The deficiency in the approach of the court below is clearly demonstrated in its treatment of the issue of promotion to the manufacturing clerical jobs. In the first of the two selections made since September 11, 1970, the job was awarded to the senior bidder. (J.A.X. 1407.) In the second selection, the job was awarded to the second most senior bidder, because the senior white bidder was bypassed due to his C-M test score. (J.A.X. 1407.) No black employee who had

more seniority than the person selected had ever been passed over for the job because of his C-M test score. (J.A.X. 1407.) Since the Company's seniority system is *bona fide*, and since the C-M test did not disqualify *any* black employee from a manufacturing clerical job, there is no basis for a finding of adverse impact and no basis for invalidating the C-M test.[13]

For promotion to management positions the necessary conclusion is the same. Since September 11, 1970, and up to the time of trial, the Company made six managerial selections, one of which was black. (J.A.X. 1412-13.) One of six is a higher percentage (16.6%) than the highest percentage of blacks in the plant (14.7%), and the black promoted was the only one to complete the Form PM test and the total assessment process. Both the PM test and the total assessment program were invalidated despite the fact that they disqualified no blacks.

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[13] The state of the record is similar on the security guard issue, where the court of appeals relied solely on the absence of any black security guards without noting that no senior black had ever been bypassed in the non-union, but straight seniority, bidding for a guard job.

It is unclear whether the court below ignored the impact of seniority on security guard selections as part of its general pattern of ignoring seniority, or based its decision on an implicit conclusion that only seniority based on a union agreement is entitled to the protection of § 703(h) and *Teamsters*. If the former was the reason, the treatment of the issue is in conflict with *Teamsters;* if the latter was the reason, the court is in conflict with *Roman* v. *ESB, Inc.*, 550 F.2d 1343, 1349 n.5, 1352 (4th Cir. 1976), as well as with *Teamsters*. In *Roman*, the Fourth Circuit made it clear that § 703(h) of Title VII related to *bona fide* seniority systems generally and not just to systems negotiated under union contracts.

C. By relying on incumbency statistics, the court below obscured the very small number of relevant promotions within the statutory period: the numbers of persons conceivably affected are in the range which has been consistently identified as too small to support a statistical inference of discrimination.

During the time period at issue in this case, the number of promotions to each job where plaintiff challenged the Company's promotion practices was extremely small. Only 6 manager, 2 lab analyst, 2 manufacturing clerical, 19 mechanic, and 11 security guard promotions were made during the more than 6 years from September 11, 1970, up to January 1, 1977, the time of trial. Although the problems inherent in small sample size were explicitly recognized in *Teamsters* and in previous cases in the Fifth Circuit and elsewhere,[14] the court of appeals below ignored the issue entirely. Even if the court were correct in stating that its statistical comparisons "shifted the burden to the Company," it disregarded the lesson of *Teamsters* when it concluded that the only way the Company could "explain the racial disparity [was] by proving job relatedness" (613 F.2d at 544, App. A at 28a). In taking this position, the court of appeals ignored the explicit caveat in *Teamsters* that an

[14] *Teamsters* v. *United States*, 431 U.S. 324, 339-40, n.20; *Mayor of Philadelphia* v. *Educational Equality League*, 415 U.S. 605, 621 (13 too small a sample); *Adams* v. *Reed*, 567 F.2d 1283, 1287 (5th Cir. 1978); *Turner* v. *Texas Instruments, Inc.*, 555 F.2d 1251, 1257 (5th Cir. 1977) (8 far too small); *Roman* v. *ESB, Inc.*, 550 F.2d 1343, 1352 (4th Cir. 1976) (83 too small); *Harper* v. *Trans World Airlines, Inc.*, 525 F.2d 409, 412 (8th Cir. 1975) (5 too small); *Robinson* v. *City of Dallas*, 514 F.2d 1271, 1273 (5th Cir. 1975) (7 too small); *Ochoa* v. *Monsanto Co.*, 473 F.2d 318, 319-20 (5th Cir. 1973) (56 too small).

adequate, innocent explanation for apparent disparities could be found in the smallness of the sample. (431 U.S. at 339-40.)[15]

In sum, the court below has ignored the decisions of this Court on the proper use of statistics in constructing a finding of discrimination, and has substituted a model of haphazard handling which can only lead to unstructured and unwarranted findings of discrimination in the Fifth Circuit and elsewhere.

3. *Conflict with Decisions of Courts of Appeals*

The conflict between the decision below and the previous decisions of this Court is disguised, but not remedied, by the court's attempt to rely on incumbency figures which do not identify the impact of any challenged practice. The court below relied on "snapshot" statistics—employment data at a given moment in time—and failed to distinguish lawful from unlawful explanations for the results. The Seventh Circuit in *Movement for Opportunity & Equality* v. *General Motors Corp.*, 622 F.2d 1235 (7th Cir. 1980), has rejected this sort of analysis and stated the reasons cogently.

The plaintiffs in *General Motors* attempted to establish their case in the same manner as plaintiffs here:

> Plaintiffs undertook to prove their claims of class-wide discrimination on the basis of data focusing on an instant in time (snapshot statis-

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[15] P. HOEL, INTRODUCTION TO MATHEMATICAL STATISTICS, 82 (4th ed. 1971), cited with approval in *Castaneda*, *supra*, indicates clearly that samples and probabilities of the magnitude reflected here cannot provide reliable statistical expectations *or* standard deviations.

> tics). Plaintiffs would take a date, look at a job, and determine the percentage of women and minorities in that job at that instant compared to the percentages in the relevant workpool. Anytime the percentages of women and minorities in the "snapshot" were less than those in the workpool, plaintiffs considered themselves to have proven discrimination by defendant.

Id., 622 F.2d at 1244.

The Seventh Circuit concluded that the plaintiffs' "snapshot" statistics did not prove their case:

> [P]laintiffs' snapshot statistics incorporate discriminatory impacts occurring before the relevant time frame.... Thus, given Congress' imposition of a statute of limitations for Title VII actions..., defendants' approach emphasizing the day-to-day decisions made during the relevant period are better than plaintiffs', which include pre-statute of limitations actions by virtue of their use of cumulative statistics. [Citations omitted.]

Id., 622 F.2d at 1245.

In the present case, the district court failed to distinguish the impact of seniority, pre-Act actions and time-barred decisions, and valid tests, because (prior to this Court's decisions in *Teamsters* and *Evans)* it found that the Company's seniority system was not *bona fide.* The court of appeals found the seniority system *bona fide* but failed to give this finding any significance in assessing the numbers upon which it relied. (*See* fn. 4, p. 5 *supra*, and discussion in text at p. 8-9, *supra.*)

Like the *General Motors'* court, the Sixth Circuit has stressed the need to find discrimination independent of the impact of a *bona fide* seniority system. In *Alexander* v. *Aero Lodge No. 735*, 565 F.2d 1364 (6th Cir. 1977), *cert. denied*, 436 U.S. 946, the court rejected the plaintiffs' statistical showing because:

> [T]he statistical differences must be discounted to the extent they are simply a reflection of the impact of a bona fide seniority system, including its job equity feature.

Id., 565 F.2d at 1382.

In remanding to the district court for reconsideration in light of its opinion, and of this Court's decision in *Teamsters*, the Sixth Circuit clarified the showing necessary to support a cause of action for discrimination in that circuit. The court of appeals directed the trial court to assess whether a "regular procedure or policy" of "unlawful discrimination" could be proved "absent consideration of the effects of the seniority system."

In contrast, after the decision below in the case at bar, no such constraint applies in the Fifth Circuit: a pattern or practice of discrimination can be proved based on statistics which agglomerate the effects of challenged practices with the effects of *bona fide* seniority systems, pre-Act actions, and time-barred decisions. *Compare Croker* v. *Boeing Co.*, 437 F. Supp. 1138, 1183, 1187 (E.D. Pa. 1977).[16]

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[16] *Compare also Younger* v. *Glamorgan Pipe & Foundry Co.*, 561 F.2d 563 (4th Cir. 1977), *on remand*, 20 FEP Cases 776 (W.D. Va. 1979), *aff'd*, 621 F.2d 96 (4th Cir. 1980), finding in light of

(footnote continued)

4. *The Case Has Great Practical Importance for Future Affirmative Action Efforts as Well as Bona Fide Seniority Systems*

By confusing the proper legal standards for identifying discrimination, the court below confounds good faith compliance by employers and penalizes efforts to remedy past imbalances. Black and white employees as well as employers will suffer from the effects of this decision.

A. The paradoxical result of the decision below is to discredit good faith efforts to ameliorate the adverse impact of a *bona fide* seniority system on black employees. The operation of a *bona fide* seniority system produced the incumbency figures condemned by the court below, but the brunt of the decision falls on promotion devices which generally operate to make competent employees, black or white, eligible for promotion even if those employees are not the most senior applicants.

The total assessement program was professionally developed in a good faith effort to identify, fairly and comprehensively, the qualifications necessary for certain jobs. EEOC guidelines encouraged the use of such programs; subsequent decisions of the courts have supported their use (*see Firefighters Institute for Racial Equality* v. *City of St. Louis*, 549 F.2d 506, 512 (8th Cir. 1977), *cert. denied*, 434 U.S. 819);

(footnote continues)

Teamsters that the plaintiffs' case, based on the admitted concentration of blacks in lower level jobs, failed because the plaintiffs could establish no discriminatory reason for this result apart from the operation of the employer's *bona fide* seniority system.

and successful affirmative action requires that companies such as Procter & Gamble have some device other than seniority to identify competence.

The benefits of total assessment for minority employees are apparent in the Company's experience. For promotions to high level operator jobs, total assessment resulted in 12 blacks being selected out of a total of 34 (35.3%). (J.A.X. 1387-89.) For mechanic jobs, 2 blacks (and 26 whites) were bypassed on the basis of total assessment for 8 mechanic jobs bid in 1973 and 1974 (the only mechanic selections where any blacks were bypassed). (J.A.X. 1398-1400.) Moreover, one of the eight openings was filled by a black employee who would not have been selected on seniority alone. (J.A.X. 1398.) For all non-management selections in which total assessment has been used, 26% (13 of 50 selections) of those selected have been black, as compared with a plant representation of 14.7%.[17]

Black employees are not helped by haphazard invalidation of such a system, and employers' affirmative action efforts will surely be chilled if it is clear that they cannot rely on EEOC guidelines or prior court decisions in constructing screening devices other than seniority. If the court of appeals has correctly applied the law, employers will be encouraged to rely strictly on seniority—a result which will harm rather than help those minorities on the lower rungs of the seniority ladder.

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[17] The plant representation of black employees was 14.7% as of January 1, 1977, which was significantly higher than at earlier times (Finding of Fact 20, App. B at 40a.)

B. To remedy the statistical condition which the courts below found sufficient to establish a *prima facie* case of violation of Title VII, the Company would have to extirpate completely the seniority rights which Title VII protects. If a *prima facie* case can be made out by reference to overall employment figures without regard to the small number of promotions, then the implication is that the Company has to create opportunities to balance its work force, by "bumping" incumbents or scrambling the seniority order of bidders in some way. This is precisely the result which Congress meant to preclude in enacting Section 703(h) and which this Court meant to make unnecessary in deciding *Teamsters*.[18]

Moreover, the court below found that the overall statistical results justified a finding that *each* of the components of the promotional system was discriminatory. The logic of such a procedure is dubious. *Compare Bridgeport Guardians, Inc.* v. *Members of the Bridgeport Civil Service Commission*, 354 F. Supp. 778, 794 (D. Conn.), *aff'd in part and rev'd and remanded in part*, 482 F.2d 1333 (2d Cir. 1973) *aff'd*, 497 F.2d 1113 (2d Cir. 1974), *cert. denied*, 421 U.S. 991 (once the overall impact is established, the impact of individual components should be assessed). The result

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[18] As the court stated in *General Motors, supra* (622 F.2d at 1245):

"By relying on cumulative statistics alone, plaintiffs grouped defendants' hiring decisions from 20-30 years ago with those of the last five years. Defendants could have hired all women and minorities for those jobs which opened during the relevant statutory periods, yet, because of the large number of existing non-minority male employees carried over from before, it would look as though defendant was still discriminating."

here of the reasoning of the court of appeals is especially perverse, because the effects of a *bona fide* seniority system have been used to discredit fair, professionally developed tests and personnel assessment techniques which are crucial to petitioner's affirmative action program.

C. In summary, under the decision below:

(a) a prima facie case is based upon the impact of a bona fide seniority system;

(b) adverse impact is statistically based on as few as two promotion decisions;

(c) promotional devices which have not disqualified a single black are invalidated; and

(d) the statutory period of limitations is disregarded in finding a violation.

The result of the decision below is to enhance the risk of random Title VII prosecution, and also to reduce the employer's range of alternatives in the creative development of legitimate remedies to modify the baneful effects of past discriminatory practices. Under this decision, there is little or no way for an employer to order his conduct to avoid Title VII sanctions. Contrary to *Teamsters*, seniority provides no safe harbor, and contrary to previous guidelines provided by the EEOC and the courts, employers cannot rely on professionally developed tests and assessment devices, either. Under the holdings below, the most fragmentary and isolated statistical results can invalidate the most careful and even-handed procedures, and leave employers without any means to reward merit, or give equal opportunity for advancement to those who have been victims of prior discrimination.

CONCLUSION

The decision below puts the Fifth Circuit at odds with this Court and with courts of appeals of other circuits; it provides no guidance to employers and labor organizations in their efforts to implement *bona fide* seniority systems, and it presents future courts presiding over Title VII cases with a nebulous and harmful model for assessing statistical evidence. For these reasons, and for all the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September, 1980

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT.

DENNIS FISHER,
Plaintiff-Appellee,

v.

PROCTER & GAMBLE MANUFACTURING COMPANY,
Defendant-Appellant.

Nos. 77-2204, 77-2205 and 77-2474.

March 12, 1980.

Gregory L. Hellrung, Harold S. Freeman, Cincinnati, Ohio, Royal H. Brin, Jr., Dallas, Tex., for defendant-appellant.

Linda N. Coffee, Dallas, Tex., for plaintiff-appellee.

Douglas S. McDowell, Washington, D.C., Robert E. Williams, Kenneth C. McGuiness, Washington, D.C., for Equal Employment Advisory Council, amicus curiae.

Appeals from the United States District Court for the Northern District of Texas.

Before THORNBERRY, GEE and HATCHETT, *Circuit Judges:*

HATCHETT, *Circuit Judge:*

In this Title VII class action,[1] brought on behalf of black employees at the Dallas plant of the Procter & Gamble Manufacturing Company (Company), we review a district court order finding discrimination in promotion

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[1] 42 U.S.C. § 2000e *et seq.*

practices, hiring, and job assignments. The order was entered prior to recent Supreme Court pronouncements directly bearing on the issues raised. While certain conclusions of the district court are inconsistent with present case law, we find other legally sufficient grounds to support its judgment in all but one respect. Accordingly, we affirm in part and vacate and remand in part.

The Company is a corporation organized and existing under the laws of the State of Ohio, doing business in Dallas, Texas. At its Dallas plant, the Company engages in the manufacture and distribution of food, soap, and synthetic detergents. The Dallas plant has operated since 1921 and has a current work force of more than 500 employees. Dennis Fisher, began employment at the Dallas facility as a hydrolizer attendant in 1967 and has been employed by the Company since that time. On March 10, 1971, Fisher filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) alleging racial discrimination against black and Spanish-American employees at the Dallas plant.[2] An EEOC right to sue letter was issued on May 24, 1974 and Fisher instituted this Title VII action on July 15, 1974.

Fisher brought the action "on his own behalf and on behalf of other persons similarly situated pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure." The

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[1] 42 U.S.C. § 2000e *et seq.*

[2] Fisher charged:

The company discriminates against me and other Negroes in that:

1) Negroes get worse job assignments.
2) Negroes get less pay.
3) Negroes are subjected to racial slurs.
4) The company uses tests to deprive Negroes of job opportunities.
5) The company does not have Negro supervisors, the company does not hire Spanish surnamed Americans, the company does not hire Negro females.

district court certified the case as a class action on behalf of all blacks employed by the Company since March 10, 1971, and all future black applicants at the Dallas plant. In his complaint, Fisher charged the Company with the following conduct:

> 1. The establishment of a promotion system which intentionally preserves the Company practice and policy of "limiting employment and promotional opportunities of black employees."
>
> 2. The classification of all management positions as "white only," and the attempt to exclude black employees from these positions.
>
> 3. The classification of security guard positions as "white only."
>
> 4. Discrimination "against black employees in the area of job assignments."
>
> 5. Discrimination "against black employees in terms of compensation."
>
> 6. The failure to prohibit racial slurs against black employees by white employees.
>
> 7. The utilization of non-professionally developed ability tests "to deprive blacks of job opportunities."
>
> 8. The failure to take affirmative action to remove the present effect of past discrimination against black persons.

Fisher further charged that he was denied promotion to a lab position in March, 1971, solely because of his failure to score well on an ability test which bore no relationship to the skills required of the job.

After a non-jury trial on the class liability issues, the district court found Company discrimination in hiring, promotions, and job assignments.

HISTORICAL FRAMEWORK

In July, 1972, the Company instituted an affirmative action program designed to make "equal opportunity . . . meaningful" at the Dallas facility. In the written plan, the purposes for the affirmative action program were outlined by the president of the Procter & Gamble Company:

> It will remain the policy of Procter & Gamble to seek out and employ members of racial or ethnic minorities. We will make special effort to employ not only the qualified but the qualifiable. We will educate our incumbent managers on the aims and the proper execution of this program. We will maintain working conditions where minority employees will find peace, dignity, challenge and equal opportunity for advancement.

Local plant managers assumed responsibility for the effective implementation of the plan. The plan included numerical hiring and promotion "goals" for each job classification, and stressed the need for stronger efforts in specified employment categories where minorities were significantly underrepresented.[3] The designated categories of significant underrepresentation included management, professional, technical, skilled, clerical, and semi-skilled positions.

Other affirmative actions outlined in the plan included:

1. active involvement in local minority organizations;

2. periodic audit of training, hiring, and promotion programs to remove impediments to the attainment of goals.

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[3] According to the plan, "goals are not considered rigid and inflexible quotas which must be met, but are targets reasonably attainable by means of applying good faith efforts to make all aspects of the Affirmative Action Program work."

3. regular discussions with local managers, supervisors, and employees to insure compliance with company policies; and,

4. review of the qualifications of all employees "to insure minorities and women are given full opportunities for transfers and promotions."

Supervisors were responsible to prevent harassment of minorities and were advised that their equal employment efforts would be measured in evaluating their work performance. Racial Awareness Seminars were instituted to correct work force attitudes hindering EEOC efforts. The program has been updated each year since 1972 to reaffirm policies and revise goals.

The impact of Company efforts is reflected in the increase in minority employment at the plant from 1966 to 1977. As depicted in the chart below, the percentage of black employees at the Dallas plant increased from .5% of the Company's total work force in 1966 to 14.7% of the total work force in 1977.

Minority Employment Figures

Dates	Black Employees	Total Work Force
1966	3	549
1967	8	545
1968	19	565
1969	29	545
1970	41	545
1971	38	490
1972	46	505
1973	61	531
1974	61	516
1975, January	64	508
1975, July	69	515
1977, January	74	505

The plaintiff does not rely on these overall employment figures to substantiate his claim of unlawful discrimination under Title VII. According to Fisher, only when we examine the promotional progress of black employees, can we discern whether the Company has engaged in discriminatory acts prohibited by law.

Blacks in Lower Echelons of Employee Hierarchy

Although the overall percentage of black employees at the Dallas plant has increased substantially during the ten year period preceding the institution of this action, blacks have remained concentrated in lower level non-management positions.

Management.

As of January 1, 1977, blacks constituted fourteen and seven tenths percent (14.7%) of the Company's total work force. In the same year, thirty-five and five tenths percent (35.5%) of the non-management employees having seniority dates after July 1, 1966 were black. As noted by the district court, the Company employed its first black manager in 1970. On March 1, 1971, one of the Company's seventy-seven management employees was black. At the time this action was filed, one of sixty-three management positions was held by a black. At the same time, blacks comprised eleven and eight tenths percent (11.8%) of the Company's total work force. From September 11, 1970, to the time the suit was instituted there were seventeen new managers, one of whom was black. The district court found that although the position of supervisor or line manager was of critical importance in matters of promotion, discipline, and employee relations, no black person had ever been a supervisor as of the time the action was brought. No black has ever held any operations manager position.

Non-Management.

As the district court recognized, the mechanic and lab analyst positions are critical non-management jobs and highly attractive to employees.[4]

At the time judgment was entered in this case, one of seventy-six mechanic jobs at the plant was held by a black. Between December, 1967, and January, 1977, three of forty-four mechanic openings were filled by blacks. At the time of judgment, blacks held none of the twenty-two lab analyst jobs. Of the twenty-four lab analyst job openings between December, 1967, and January, 1977, one was filled by a black. Blacks were underrepresented in other important job categories including manufacturing clerical,[5] and security guard positions.[6] In contrast, the district court found overrepresentation of blacks in the "slide handler" position, which is considered "one of the least desirable jobs" at the plant.[7]

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[4] The district court found that six pay levels exist for non-management positions in the plant. From the lowest to the highest, the levels are: A (Specialist I); B (Specialist II); C (Specialist III); D (Technician I); E (Technician II); and F (Technician III). With few exceptions, employees in mechanic and lab analyst positions are paid at the D, E or F rate levels.

[5] The district court noted that as of March 29, 1971, blacks held none of the forty-one clerical jobs and that since that time the Company's annual Employer Information Reports (EEO-1 Forms) have never indicated more than one black holding a clerical position. As of January, 1976, one of twenty-nine clerical positions was filled by a black.

[6] The district court found that the Company had never employed a black security guard: "Of twelve security guard jobs bid from September, 1970, until January 1, 1977, only one black was selected, but he subsequently withdrew his bid."

[7] Employees working as slide handlers stack pieces of finished product into a pattern, formation or tie so that the product may be mounted on a forklift for relocation and distribution. Work as a slide handler at the Dallas plant was conducted in a warehouse which had no drinking fountain and which lacked adequate ventilation.

Blacks are significantly underrepresented in key upper level positions in a Company whose total work force fairly represents the racial make-up of the standard metropolitan area in which it is located.[8] This incongruity draws into question the design and operation of the system employed to select applicants and promotees for these higher level positions.

It is the Company's policy and practice to hire persons into various entry level positions and to provide them with on-the-job training and experience.[9] Higher level openings are most often filled by current low or entry level employees demonstrating capability for promotion or transfer. Accordingly, class members claiming underrepresentation in higher level positions, have focused their attack not on the Company's initial hiring practices but on the promotion system utilized at the plant.[10]

THE COMPANY'S PROMOTION SYSTEM

Under the terms of the collective bargaining agreement between the Company and the Independent Oil and Chemical Workers of Dallas it was agreed that:

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[8] The trial court found that approximately twelve and eight tenths percent (12.8%) of the total work force in the Dallas-Fort Worth Standard Metropolitan Statistical Area is black. Blacks comprised fourteen and seven tenths percent (14.7%) of the plant's total work force as of January, 1977.

[9] The following job titles or classifications require entry level skills: Employee Services Staff Technician I, Industrial Engineering Staff Technician I, Office Staff Technician II, Accounting Staff Technician I, Office Staff Technician I, Office Staff Specialist III, Maintenance Technician I, II & III, and Management. Entry level positions require no previous skills.

[10] In his pre-trial brief, Fisher acknowledged that "[t]he primary issues raised in this litigation concern Defendant's alleged job classifications based on race and racially discriminatory promotional policy. Correllary [sic] issues concern job assignments, Defendant's efforts to remove the vestiges of past discrimination and Defendant's efforts to insure a working atmosphere free of racism."

> Plant Seniority shall be the governing factor in both promotions and demotions in all cases where ability and merit, as judged solely by the Employer, are approximately equal. Seniority of an employee shall begin after he has been continuously in the employ of the Employer for six months and shall then be computed from the latest date of employment.
>
> . . . . .
>
> It is understood that in all cases under Article XI, Seniority, where the Employer exercises his judgment of ability and merit, such judgment is not subject to arbitration.
>
> . . . . .
>
> Notice of a job vacancy or a new job will be made by posting for three days on the plant bulletin boards, showing the type of job and rate. If no one in the plant bids on the job, or is qualified, the job shall be open to new hires.

Promotion to all non-management categories other than security guard positions is governed by the terms of the collective bargaining agreement. Plant-wide seniority governs in all cases where ability and merit are judged to be approximately equal by the Company. Different merit and ability assessment schemes are utilized depending on the importance of the job from the Company's perspective. With respect to most jobs in the plant, merit and ability are judged by evaluating the bidder's work performance, absentee record, disciplinary history and pertinent medical condition. Promotion to the "most critical" non-management jobs is made pursuant to a selection procedure designated by the Company as "a professionally developed total assessment process."[11]

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[11] These include mechanic, lab analyst, and high level operator positions.

All employees are entitled to "bid" laterally, downward, and upward across all departments for job vacancies occurring anywhere in the plant. When a job vacancy occurs, a notice is posted throughout the plant for three days. The notice includes the number of vacancies, the department in which they occurred, the job title, wage rate, and a brief description of the nature of the work. The notice also informs employees that anyone interested in bidding must either attend a meeting at a specified time and place, or contact a designated person to make alternative arrangements. After the bid is removed, the bidders are listed according to plant seniority. If the vacancy occurs with respect to one of the less critical jobs in the plant, the senior bidder will be awarded the job if he is determined to have average merit and ability under the above noted general criteria for positions not requiring total assessment. If the vacancy occurs in one of the more critical plant positions, total assessment will be utilized to measure the merit and ability of the job bidders.

The Total Assessment Process.

"Total assessment" is a system designed to gather extensive evidence regarding an applicant's job related capabilities. The system is characterized by four main features. First, the identification of skills, abilities and other aspects of work behavior which are considered important for the effective performance of the job being considered. The Company refers to these indicia of effective performance as "what counts" factors.[12] These factors are determined for each position based on the results of

[12] These factors vary with the job being considered. For instance, "dexterity and coordination" is one of the eight designated "what counts" factors for mechanical positions, but is not listed as a "what counts" factor for high level operator positions.

national surveys of company supervisors distributed by the Procter & Gamble Company in Cincinnati, Ohio. The surveys ask company supervisors to rate what they feel to be the key criteria for effective performance of the production jobs within their unit. A second feature of the total assessment system is the use of several means to secure evidence of a given applicant's capabilities.[13] Once the Company knows what factors count, it must have valid means of determining whether a given applicant meets the necessary criteria. Next, the system requires a uniform method of recording and organizing the evidence received. Finally, the process demands a systematic means of evaluating the evidence to provide a sound basis for advancement decisions.

The non-management level jobs for which total assessment is utilized include mechanic, lab analyst, and high level operator positions. Job bidders for these positions with the greatest plant-wide seniority and with at least an "acceptable" total assessment profile are selected to fill the vacancies. Because the most senior acceptable bidder will be selected to fill the vacancy, only the more senior bidders are initially totally assessed. If an acceptable bidder is not found in this group of senior bidders, a second group of the next senior bidders is totally assessed.

Each of the employees in the separated group of senior bidders begins the total assessment process by completing what is referred to as an Experiences Form. The form asks the bidder to state specific personal experiences either on or off the job, which relate directly to

[13] Among the means used to secure evidence are: the application form and other pertinent records; an "experiences form" completed by the applicant; an "experiences form" completed by one or more managers in a position to describe specific experiences typical of the employee's performance; a structured interview procedure; and the use of aptitude and ability examinations.

the "what counts" factors listed for the position sought. Additionally, managers acquainted with the bidder's work performance complete Employee Description Forms, describing incidents of the bidder's job performance as they relate to the "what counts" factors. On the form, these same managers also make recommendations as to the applicant's suitability for the job he is seeking. If two or more managers indicate that they "do not recommend" the applicant, the assessment will not be continued. Next, two managers, one having responsibility for the job to be filled, and one involved in employment matters, interview the applicant. The interviewers independently prepare a profile of the applicant, rating him on a scale from one to seven on the various "what counts" factors. At the interview, the bidder is given an opportunity to relate additional information which may demonstrate his ability to effectively perform the work required. Finally, written aptitude or production tests are administered to each of the bidders.[14] For mechanic positions the bidder takes the Aptitude Form M-A Test.[15] Bidders for lab analyst positions take the Aptitude Form C-M Test.[16] Bidders for high

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[14] The Company refers to these examinations as "professionally developed tests" which are designed to measure the ability and merit of the bidder in relation to the particular job sought.

[15] The Aptitude Form M-A Test was designed in the personnel research department of the Procter & Gamble Company, Cincinnati, Ohio, in 1964. The Company considers the test appropriate for use in reviewing applicants for "jobs requiring considerable mechanical ability." The test is designed to measure mechanical comprehension, reading comprehension, and the ability to handle technical information.

[16] The Aptitude Form C-M Test was designed in the personnel research department of the Procter & Gamble Company, Cincinnati, Ohio. It was first instituted at the plant in 1963. It is a factor in considering an applicant for a position as a clerk or laboratory analyst in a manufacturing plant or a cost clerk or laboratory technician in a technical center. The examination tests vocabulary, mathematic, and data interpretation skills.

level operator positions take the Aptitude Form M-A Test and the Production Control Test (PCT).[17] The test results are used as one of the factors in the Company's evaluation of the applicant's ability and potential to perform the job for which he applies.

Utilizing all of the above data, the bidder is rated in each of the what counts areas and is given an overall total assessment performance rating of "strong", "acceptable", "borderline" or "weak". The senior bidder who has achieved at least an acceptable rating will be selected for the job. As the district court noted, generally a senior applicant rated acceptable will be selected over a junior applicant rated strong, but a junior applicant rated acceptable will be selected over a senior applicant rated borderline. If none of the senior group of bidders who have undergone total assessment receives an "acceptable" rating, the process is repeated for the next highest group of seniority bidders.

Management Positions.

The Company fills the majority of its management level vacancies by hiring recent college graduates with engineering or other technical degrees. The remaining management level vacancies are filled by promotion from non-management positions within the plant. Non-management employees being considered for promotion to

[17] The Production Control Test (PCT) was designed at the personnel research department of the Procter & Gamble Company, Cincinnati, Ohio. It was first used at the plant in 1972. The Company views the test as appropriate for use in considering candidates for production jobs in manufacturing "which require the ability to make judgments about the quality level of products based upon readings from gauges and other displays." The test is composed of forty items and calls for decisions about product quality based upon readings from a set of five gauges.

management must go through total assessment, including the taking of the Aptitude Form P-M Test.[18]

DISTRICT COURT ORDER

After a non-jury trial, the district court concluded that the Company discriminated against plaintiff's class in its practices relating to job assignments and in its promotional policies relating to management, mechanical, lab analyst, manufacturing clerical, and security guard positions. The court found no business necessity for the college degree requirement for hiring into management or for the 20 years experience requirement for promotion to management. Moreover, the total assessment program was determined to be an invalid promotion tool "as long as blacks are so disproportionately underrepresented in defendant's management." Finally, the Aptitude Form C-M Test, when used for clerical positions, and the Aptitude Form P-M Test, when not used in conjunction with a valid total assessment program, had not been shown to be professionally developed ability tests within the meaning of 42 U.S.C. § 2000e-2(h).

The district court entered its judgment against the Company, and ordered it to:

> 1. compensate the plaintiff class for discriminatory promotion practices in an amount to be determined by the court at a later hearing;
>
> 2. include in all posted vacancy notices a statement informing employees that attendance at the

[18] The Aptitude Form P-M Test was designed in the personnel research department of the Procter & Gamble Company, Cincinnati, Ohio. It was specifically designed for use with candidates for first-line management positions. The test was instituted at the plant in 1967. It is a ninety minute examination consisting of forty-eight multiple choice questions, designed to measure reading comprehension and data interpretation.

meeting of bidders to discuss the vacancy is mandatory;

3. devise a test, if a test is used, for manufacturing clerical positions which fully meets EEOC Guidelines concerning criterion—related validation;

4. discontinue use of the Aptitude Form P-M Test for selection of non-management employees for management positions, unless it is used in conjunction with a valid assessment program;

5. prepare and file either proposed affirmative action plans or a single affirmative action plan,[19] containing the elements delineated in the court's Conclusions of Law;[20] and

6. pay attorney's fees to the plaintiff's attorneys and to the attorneys for certain "objectors".

ISSUES

The Company argues that the district court erred in: (I) considering events which occurred prior to September

[19] The class plaintiffs were also ordered to submit a proposed affirmative action plan. As an alternative, the parties were permitted to submit "an agreed upon plan instead of separate, proposed plans."

[20] In its Conclusions of Law, the district court directed that any such plan shall include provisions relating to: "training programs; opportunities for college training or training at a technical institute; goals for promotion of blacks into positions in which defendant has been found to have discriminated; clear explanations to the non-management employees of the selection procedures for promotions, including explanations of the roles played by the PM, MA, CM, and PCT tests; disciplinary procedures; plans for reduction of racial tensions at defendant's plant; and plans for making defendant's management personnel more aware of and sensitive to the situation of black employees."

11, 1970, the beginning of the effective statute of limitations period; (II) basing its liability finding on the Company's hiring practices, which were never at issue in this case; (III) finding Company discrimination in promotion to management and key non-management positions; (IV) finding Company discrimination in its job assignment practices; (V) awarding attorney's fees to counsel for certain class members who, according to the Company, had never become parties to the lawsuit; and, (VI) ordering the Company to remedy practices which had not been found to be discriminatory.

DISCUSSION OF THE ISSUES

I.

The Company argues that the district court erred in failing to restrict the evidence to alleged acts of discrimination occurring after September 11, 1970, the beginning of the EEOC statutory period.[21] Resolution of this issue is guided by Supreme Court pronouncements issued after the district court judgment was entered. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977). According to the Company, these cases foreclose judicial consideration of prior discriminatory acts which are said to have continuing impact on alleged discriminatees. The cases, however, establish no such prohibition.

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[21] An EEOC complaint must be filed within 180 days of the alleged discriminatory act. 42 U.S.C. § 2000e-5(e); *Hamilton v. General Motors Corp.*, 606 F.2d 576 (5th Cir. 1979); *Chapell v. Emco Machine Works Co.*, 601 F.2d 1295 (5th Cir. 1979); *McArthur v. Southern Airways, Inc.*, 569 F.2d 276 (5th Cir. 1978) (en banc). The 180th day prior to the March 10, 1971 date on which Fisher filed the EEOC charge of discrimination is September 11, 1970.

In *Teamsters*, the Supreme Court discussed the effect of section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h),[22] on a seniority system which "operate[d] to freeze the status quo of prior discriminatory employment practices." 431 U.S. at 349, 97 S.Ct. at 1862. Under the seniority system in *Teamsters*, lower paid city drivers who transferred to more desirable line driver jobs were required to forfeit all competitive seniority accumulated in their former positions, and to start with the lowest seniority in the line driver pool. By discouraging transfer to more desirable positions, the system perpetuated the effects of past discriminatory hiring. The government argued that such a system could not be "bona fide" within the meaning of section 703(h). According to the court, however, section 703(h) was designed to immunize seniority systems that allowed for the full exercise of seniority accumulated before the effective date of the Act. The court held that "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." 431 U.S. at 353-354, 97 S.Ct. at 1864.

The *Teamsters* rationale was developed further in *Evans*, where the Court addressed the legality of a seniority system which perpetuated post-Act discrimination.[23]

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[22] Section 703(h), 42 U.S.C. § 2000e-2(h), provides:

> Notwithstanding any other provision of this [Title], it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . . .

[23] As the *Evans* court acknowledged, the seniority system gave "present effect to a past act of discrimination" occurring subsequent to the effective date of the Act. *Evans*, 431 U.S. at 558, 97 S.Ct. at 1889.

In *Evans*, a female flight attendant was forced to resign upon her marriage in 1968, but was rehired by the airline in 1972. The attendant did not file an EEOC charge of discrimination within 90 days of her separation in 1968.[24] Recognizing that this failure barred relief based directly on the 1968 resignation, the flight attendant argued that she was the victim of a continuing violation caused by the impact of the past illegal act on her present seniority status. This continuing violation was said to have occurred within the statutory period preceding her EEOC charge of discrimination which was filed in 1973. The Court acknowledged that the airline's refusal to credit the flight attendant with pre-1972 seniority gave present effect to the past discriminatory act of forced resignation. It was not convinced, however, that the continuing effect of the past act of discrimination was sufficient to constitute a "present violation" of the Act:

> Respondent emphasizes the fact that she has alleged a *continuing* violation. United's seniority system does indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be on mere continuity; the critical question is whether any present *violation* exists.

431 U.S. at 558, 97 S.Ct. at 1889.

The attendant in *Evans* based her entire claim on the present *application* of a neutral seniority system which perpetuated the effects of a past discriminatory act not made the subject of a timely charge. The Court held that the operation of an otherwise bona fide and neutral seniority system is not unlawful under Title VII merely

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[24] The applicable time limit on the date she filed her claim was 90 days. Effective March 24, 1972, this time limit was extended to 180 days. See section 706(d) of Title VII, 42 U.S.C. § 2000e-5(e).

because it perpetuates post-Act discrimination that has not been made the subject of a timely charge of discrimination.

Neither *Evans* nor *Teamsters* foreclose consideration of prior discrimination in all circumstances. They hold only that prior discrimination, by itself, cannot make the operation of an otherwise bona fide seniority system unlawful. They do not hold, as the Company suggests, that a continuing violation can never constitute an actionable wrong; only that the *mere* perpetuation of the effects of pre-Act or time barred discrimination does not constitute a present violation. *See also, Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978); *James* v. *Stockham Valves & Fitting Co.*, 559 F.2d 310 (5th Cir. 1977); *Clark* v. *Olinkraft, Inc.*, 556 F.2d 1219 (5th Cir. 1977). In *Olinkraft* this court noted that notwithstanding *Evans*, where an entire promotion system is challenged on the basis that it operates to hold plaintiffs "in lower echelons," the 180 day statutory period is inconsequential in determining the admissibility of prior discriminatory acts.

After reciting Company employment and promotion practices occurring prior to September 11, 1970, the district court noted that such evidence "is relevant and admissible to show possible plant-wide discriminatory conduct with continuing effects, the probability of the continuation of such conduct, and the relationship between past actions and present effects and actions." *Citing, Swint* v. *Pullman-Standard*, 539 F.2d 77 (5th Cir. 1976); *Burns* v. *Thiokol Chemical Corp.*, 483 F.2d 300 (5th Cir. 1973). There is no question that, without the benefit of *Teamsters* or *Evans*, the district court overstated the test for the consideration of past discriminatory conduct. The challenged evidence was improperly considered, however, only if the district court viewed the prior discriminatory acts as constituting the actionable wrongs

upon which relief was based. *Dobbs* v. *City of Atlanta, Ga.*, 606 F.2d 557 (5th Cir. 1979); *United Air Lines* v. *Evans.* If, on the other hand, prior practices were considered relevant to show independently actionable conduct occurring within the statutory period, the district court did not err in taking the evidence into account.[25]

Considering the district court order in its entirety in light of all the evidence before it, we conclude that the court did not improperly premise its judgment on past discrimination. The EEOC charge and class action complaint alleged the present existence of racially discriminatory employment practices. The major thrust of the complaint was directed at the promotion system still in effect at the plant. The court found discrimination not with respect to pre-1971 conduct, but in specific employment practices occurring within the appropriate statutory time frame.[26]

One other factor should be emphasized in considering the admissibility of testimony regarding past acts of discrimination. Unlike the private suit in *Evans*, this action brought under challenge a broad range of employment practices which were said to affect nearly all past, present, and future black employees at the Dallas plant. Thorough and coherent consideration of the plaintiff's claims would necessarily require the recognition of various

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[25] As the Supreme Court stated in *Evans:* A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. *It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered,* it is merely an unfortunate event in history which has no present legal consequences. *Evans*, 431 U.S. at 558, 97 S.Ct. at 1889. (Emphasis supplied).

[26] As noted, the court found that the Company had committed discriminatory acts in promotion to management and certain non-management positions, and in assignment to various jobs.

factors which carry no independent legal consequences. In reviewing class action cases of this kind, where the challenges are broad and sweeping, we are more inclined to accept the district court's assessment of the admissibility of evidence which it deems relevant. Fed.R.Evid. 403, 404; *Claiborne* v. *Illinois Central Railroad*, 583 F.2d 143 (5th Cir. 1978); *James* v. *Stockham Valves*. We conclude that the district court did not err in admitting evidence of past discriminatory acts.

II.

The Company next contends that the trial court erred in basing its liability finding on hiring practices which were never at issue in this case. The Company is correct in asserting that its hiring practices were not directly in issue before the district court. The plaintiff's complaint did not allege discrimination in hiring. Hiring practices were not set forth among the contested issues of fact or law in the court's pre-trial order. Fisher's pre-trial brief acknowledged that the issue of overall hiring practices was "simply not being raised in this litigation." The question then becomes to what extent has the district court based its judgment on discriminatory hiring practices of the Company. We find that with the exception of one finding and conclusion, the court correctly limited its holding on discrimination to employment practices other than hiring. *Consideration* of hiring practices, both before and after the applicable statutory period, is a necessary predicate to meaningful findings regarding employment practices at issue in this case. *See, Clark* v. *Olinkraft, Inc.* To fully examine the significance and impact of promotion polices on black advancement within the Company, the court properly identified the number and percentage of black employees hired at entry-level positions over a substantial period of years. The figures were not used to independently form the basis for a finding of liability

against the Company. That finding, with one exception, was premised on the Company's discriminatory promotion practices and job assignments.

Although we find nothing improper in the court's consideration of hiring figures to substantiate its finding of discriminatory promotion practices, we believe the court erred in making specific conclusions of discriminatory hiring into management positions. According to the court, the Company demonstrated no business necessity for its policy of hiring only recent college graduates with engineering or technical degrees. Whatever the legal sufficiency of that conclusion, the issue had not been properly joined or litigated before the district court. Accordingly, we vacate those portions of the district court judgment requiring the Company to alter its hiring qualifications and other hiring practices. *Hodges* v. *United States*, 597 F.2d 1014 (5th Cir. 1979); *Pierre* v. *United States*, 525 F.2d 933 (5th Cir. 1976).

III.

Citing what it calls the "application of erroneous and inappropriate legal principles," the Company argues that the district court erred in concluding that the Company discriminated against blacks in promotion to management, mechanical, lab analyst, manufacturing clerical, and security guard positions.[27]

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[27] The Company also asserts that the district court erred in concluding that the Company "demonstrated no business necessity" for its policy of hiring into management "only recent college graduates with engineering or technical degrees," and for its "twenty years experience" requirement for promotion from non-management to management positions. Our determination on the impermissibility of district court conclusions on hiring renders unnecessary a discussion of the college graduation requirement for hiring into management. Because the

(footnote continues)

The district court premised its conclusion on several major findings. While we agree that one of these findings has no basis in present case law, we are satisfied that the conclusion is amply supported on other legally sufficient grounds.

Applying legal principles then in effect, the court found that the Company "does not have a bona fide seniority system within the meaning of 42 U.S.C. § 2000e-2(h)."[28] Under the law of this circuit at the time the judgment was entered, seniority systems which perpetuated the effects on incumbent employees of prior discrimination were not bona fide within the meaning of 703(h) of Title VII, 42 U.S.C. § 2000e-2(h). *United States* v. *Jacksonville Terminal Company*, 451 F.2d 418 (5th Cir. 1971); *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F.2d 980 (5th Cir. 1969).

(footnote continued)

twenty years experience requirement relates to promotion from non-management to management positions within the Company, our consideration on this point is not foreclosed by our holding that hiring practices were not before the district court. Shortly before trial, a black employee with only nine years experience was successfully promoted to a management level position. Fisher asserts that the promotion establishes that there is, as the district court concluded, no business necessity for the twenty years requirement. The Company points to that same promotion to argue that there was never any twenty years experience requirement for promotion to management. Whatever the Company policy at this time, we affirm the district court finding on lack of business necessity. The Company is enjoined from imposing a twenty year requirement in the future, whether or not it has in the past.

[28] We note at the outset that management and security guard positions are not covered by the terms of the seniority system embodied in the union contract. Because we uphold the district court conclusion as to discrimination in promotion to these positions on other grounds, we need not separately consider the effects of the seniority ruling on positions not covered in the union contract.

Since *Teamsters* and *Evans*, however, we have recognized that an otherwise bona fide seniority system "is not itself illegal merely because it perpetuates the effects of pre-Act or post-Act discrimination." *Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d 1157, 1189 (5th Cir. 1978). In other words, a seniority system is no longer non-bona fide because it operates to " 'freeze' the status quo of prior discriminatory employment practices." *Teamsters*, 431 U.S. at 349, 97 S.Ct. at 1862. Instead, "purposeful discrimination in connection with the establishment or continuation of a seniority system is integral to a determination that the system is or is not bona fide." *James* v. *Stockham Valves*, at 351. In *Stockham Valves* we noted four factors to be considered in determining whether a seniority system is bona fide:

> 1) whether the seniority system operates to discourage all employees equally from transferring between seniority units;
>
> 2) whether the seniority units are in the same or separate bargaining units (if the latter, whether that structure is rational and in conformance with industry practice);
>
> 3) whether the seniority system has its genesis in racial discrimination; and
>
> 4) whether the system was negotiated and has been maintained free from any illegal purpose.

Id. at 352.

There are no individual "seniority units" at the Dallas plant. Seniority for all purposes is calculated on a plant-wide basis without regard to prior job classification. The system does not lock employees into inferior jobs by requiring them to commit "seniority suicide" by forfeiting accumulated seniority upon advancement. See, *Stockham Valves*, at 348; *Teamsters*, 431 U.S. at 344, 97 S.Ct. at

1859. Any employee may compete for any job vacancy in the plant based upon his total length of service with the Company. Moreover, as in *Teamsters*, there is no evidence in the record to show that the seniority system had "its genesis in racial discrimination" or that it was negotiated and maintained for any "illegal purpose." *Teamsters*, at 356, 97 S.Ct. at 1865.[29]

Acknowledging that the court's order was premised on case law then in effect, we reject its finding that the seniority system was not bona fide within the meaning of 703(h) of Title VII. The system is therefore legally valid under the immunity of that provision.

The existence of a bona fide seniority system, however, does not shield the Company from "*other* illegal acts, so long as those other acts are independently actionable." *Pettway*, at 1189. It is well recognized that racially discriminatory promotion practices are actionable wrongs under Title VII regardless of the bona fide character of the controlling seniority system. *See, Davis* v. *Board of School Commissioners of Mobile County*, 600 F.2d 470 (5th Cir. 1979); *Claiborne* v. *Illinois Central Railroad; James* v. *Stockham Valves; Pettway; Teamsters.* Moreover, post-Act discriminatees may receive complete retroactive seniority "without attacking the *legality* of the seniority system as applied to them." *Teamsters*, 431 U.S. at 347, 97 S.Ct. at 1861. (Emphasis supplied)

Like the plaintiff in *Clark* v. *Olinkraft*, Fisher contends not only that the seniority system perpetuates the effects of past discrimination, "but also that discrimination in promotion . . . constitutes a continuing and unlawful employment practice in violation of Title VII." *Clark* v. *Olinkraft*, at 1222; *see also, Stockham Valves*, at 351.

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[29] Fisher conceded in his pre-trial brief that the "seniority provision is a neutral employment practice."

The district court found that the Company had committed present and continuing violations. This conclusion was premised not only on the court's finding that the seniority sytem was not bona fide, but on its finding that the Company engaged in active discrimination in granting promotions to certain positions. Because the record supports the latter finding, the district court's erroneous determination as to the bona fide nature of the seniority system does not affect the outcome.[30]

When plaintiffs assert that they have been victims of the "disparate impact" of illegal promotion practices, proof of discriminatory motive is not required under Title VII. *Davis* v. *Board of School Commissioners of Mobile County*, at 473; *Teamsters*, 431 U.S. at 335 n. 15, 97 S.Ct. at 1854 n. 15; *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 91 S.Ct.

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[30] There is a further reason for not finding reversible error in the district court's determination that the seniority system was not bona fide. For the purposes of determining the validity of a seniority system which perpetuated the effects of past discrimination, the Court in *Teamsters* refused to distinguish between systems that perpetuate pre- and post-Act discrimination. *Teamsters*, 431 U.S. at 348 n. 30, 97 S.Ct. at 1861 n. 30. As to relief, however, the Court concluded that while post-Act discriminatees may receive full "make-whole" relief, including retroactive seniority to the date of their employment, pre-Act discriminatees may receive retroactive seniority only to the effective date of the Act. Accordingly, the issue whether the seniority system is bona fide under section 703(h) of Title VII is relevant to this case "only if . . . the class of black employees represented by the plaintiffs consists of some blacks who suffered only from pre-Act discrimination." *James v. Stockham Valves*, at 351. The class in this case is limited to blacks employed since March 10, 1971, and future employees at the Company plant. The earliest seniority date for a current black employee at the plant is August 8, 1966. There is no claim that any class members suffered only from pre-Act discrimination. We therefore note that even if the seniority system were properly held to be non-bona fide, "such a holding would in no way enlarge the relief to be awarded." *Teamsters*, 431 U.S. at 348 n. 30, 97 S.Ct. at 1861 n. 30.

849, 28 L.Ed.2d 158 (1971). Once the plaintiffs have demonstrated the racially adverse impact of promotion practices and tests, it becomes the Company's burden to prove job relatedness or business necessity. *Scott* v. *City of Anniston, Alabama*, 597 F.2d 897 (5th Cir. 1979); *Washington* v. *Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976).

We find ample record evidence to demonstrate the disparate impact of Company promotion policies. As noted, while blacks comprise 14.7% of the total work force, they are marked by their conspicuous presence in the "lower echelons" of the employee hierarchy. *See Clark* v. *Olinkraft, Inc.*, at 1222; *Rich* v. *Martin Marietta Corp.*, 522 F.2d 333, 348 (10th Cir. 1975). When this action was filed, one of the sixty-three company managers was black, none of the twenty-two lab analysts was black and none of the security guards was black. At the time of judgment, one of twenty-nine clerical workers was black, and one of seventy-six mechanics at the plant was black. The Company asserts that these figures are insufficient to support a prima facie case, without competent evidence to show the percentage of black workers in the community possessing the necessary skills and qualifications for the under-represented positions. *Hazelwood School District* v. *United States*, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977); *Williams* v. *Tallahassee Motors, Inc.*, 607 F.2d 689 (5th Cir. 1979). In *Hazelwood*, the Supreme Court approved the use of comparative statistics showing a narrow labor pool defined by those qualified for employment to particular jobs available. The court explained:

> When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.

Id. at 308 n. 13, 97 S.Ct. at 2742 n. 13.

Mindful of *Hazelwood*, we nevertheless find the plaintiff's statistics adequate to establish a prima facie case. First, a prima facie case may be shown without evidence of qualifications where the inference of discrimination is supported by a compelling level of racial underrepresentation in a sizeable work force. *Jones* v. *Tri-County Electric Cooperative, Inc.*, 512 F.2d 1 (5th Cir. 1975); *see e.g.*, *United States* v. *Hayes International Corp.*, 456 F.2d 112 (5th Cir. 1972); *Parkham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970). In *Hayes International Corp.*, we noted that when substantial underrepresentation is shown as compared with general population figures, the burden of proving lack of qualification is on the Company. Moreover, the usefulness of statistics of this nature "varies with the surrounding facts and circumstances, which either support or undermine the inference of discrimination offered by the statistics." *Williams* v. *Tallahassee Motors, Inc.*, at 691; *United States* v. *Ironworkers Local 86*, 443 F.2d 544 (9th Cir. 1971). The Company's entry level hiring policy is a distinctive circumstance in this case supporting the inference of discrimination. When a company adopts a policy and practice of hiring in at low level unskilled jobs and promoting to upper-level positions based upon training received and skills developed at the plant itself, it cannot convincingly challenge the prima facie showing under the *Hazelwood* "qualifications" dicta. Where skills are commensurate with company training, we will approve statistical comparisons between racial make-up in key positions and racial composition in the total work force. See, *James* v. *Stockham Valves*, at 341; *Scott* v. *City of Anniston*, at 901. Because the statistics support the district court finding of adverse impact upon black employees, the burden shifted to the Company to explain the racial disparity by proving job relatedness. *Williams* v. *Tallahassee Motors, Inc.*; *Rodriguez* v. *East Texas Motor Freight*, 505 F.2d 40 (5th Cir. 1974), *vacated and remanded on other grounds*, 431

U.S. 395, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977). Advanced promotion at the plant was premised on two company practices found objectionable by the district court—the administration of qualifying tests for certain positions and the application of the total assessment program.

Qualifying Tests.

Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) provides that it shall not be an unlawful employment practice:

> for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

When an examination has been shown to affect a racially disparate impact, the employer must prove that the test is job related. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975); *Griggs* v. *Duke Power Co.* The employer does not meet his burden by establishing merely a rational basis for the test. It must be validated by a demonstration that the examination is "appropriate for the selection of qualified applicants for the job in question." *Washington* v. *Davis*, 426 U.S. at 247, 96 S.Ct. at 2051; *Dothard* v. *Rawlinson*, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977).

The district court found that the Form C-M Test,[31] when used in promotion to manufacturing clerical positions, and the Form P-M Test,[32] as employed in the

[31] The examination is a two-part test consisting of 100 questions to be answered within 49 minutes. The questions are designed to test the applicant's vocabulary, mathematic and chart analysis skills. *See infra*, footnote 16.

[32] The Form P-M examination consists of 48 multiple choice items designed to measure skills in two areas: reading comprehension and data interpretation. *See infra*, footnote 18.

promotion to management positions, had not been proved to be professionally developed ability tests within the meaning of 42 U.S.C. § 2000e-2(h). Both tests were designed in the personnel research department of the Procter & Gamble Company, Cincinnati, Ohio.

The Company has not met its burden to show validation of these tests for the purposes cited. A validation study for the Form C-M Test relating to selection to manufacturing clerical jobs was conducted in 1975. The district court noted, however, that the study "found no statistical or practical significance in the correlation of test scores and job performance for blacks."[33] No criterion-related validation study was shown to support the use of the Form P-M Test. The court found that the test "lacked content validity for the majority of job factors deemed most significant" for the performance of supervisorial duties.[34] In the absence of any company showing that the tests had been properly validated, the district court did not err in concluding that the exams had not been shown to be professionally developed ability tests under section 703(h) of Title VII.

Total Assessment.

Once a prima facie case of discriminatory *practices* has been shown, "it becomes the employer's burden to demonstrate the job performance validity of its practices."

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[33] The court ordered the Company to devise a C-M Test which meets the EEOC guidelines concerning criterion-related validation.

[34] The job factors deemed significant for supervisory personnel as determined by the Company from the results of questionnaires submitted to 114 managers in Procter & Gamble Co. plants throughout the nation are: concern for others; satisfaction in the role of a first-line manager; ideas and change; initiative in problem-solving and decision-making; technical knowledge of departmental operations; written communications skills; organization of work of others and follow-up; strength and firmness; effectiveness under stress; feel for relative importance of various aspects of work; and willingness to work hard.

Scott v. *City of Anniston*, at 901; *Williams* v. *Tallahassee Motors, Inc.*; *Washington* v. *Davis*. This, the Company has not done. As the district court noted, ratings on "what counts" factors such as "desire to do the work well," "working well with others," and "learning the work" involve substantial subjectivity. Moreover, management performance appraisals, experience forms, and scheduled interviews also provide a mechanism for subjective analysis. As the court explained, these promotional tools provide raters the "opportunity to choose which events to emphasize or omit." Under total assessment, all bidders for promotion must be reviewed and assessed by management personnel at the supervisory level.

Against this backdrop, the district court found that when this action was instituted in 1974, no black person had ever been a supervisor at the Company plant. Nor had any black manager participated as a rater in total assessment for promotion. At the completion of the trial, no black had acted as a rater in total assessment for promotion in which a final selection had been made. In light of these and other factors,[35] the court concluded that total assessment was not a valid method for evaluating qualifications for promotion. We agree. This court has recognized that promotion systems utilizing subjective evaluations by all white supervisors provide a ready mechanism for discrimination. *Hamilton* v. *General Motors*

[35] The court also considered overt acts of discrimination showing active bias against potential black managers. Among the specific acts found by the trial court were these: a black was allegedly rejected for a management position because he was over-qualified; a white supervisor told a non-management employee that he, the supervisor, was a racist; another white manager told a black employee that blacks were not capable of performing the higher level jobs; the plant's industrial relations manager stated that blacks need more training than whites because whites are more accustomed to working in industry; and the plant manager stated to black employees that whites would have to approve whomever was selected as the first black supervisor.

Corp., 606 F.2d 576 (5th Cir. 1979); *accord*, *James* v. *Stockham Valves; Rowe* v. *General Motors Corp.*, 457 F.2d 348 (5th Cir. 1972). The significant underrepresentation of blacks in supervisory level management positions, provides an adequate basis for the district court's invalidation of the Company's total assessment program.

Having discredited the two major mechanisms upon which advanced promotions were premised, the district court found discrimination in promotion to key company positions. We sustain the district court finding of discrimination in promotion to mechanic, lab analyst, manufacturing clerical, security guard,[36] and management positions.

IV.

Having carefully reviewed the evidence offered to show discrimination in assignment to the "slide handler" position, we find no error in the district court's conclusion.[37]

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[36] While neither total assessment nor legally invalid tests applied in promotion to security guard positions, the disproportionate underrepresentation of blacks in this position, unexplained by the Company, was sufficient to support the district court finding of discrimination. *Scott v. City of Anniston; Claiborne v. Illinois Central Railroad.*

[37] There is no dispute that the slide handler position is one of the least desirable in the plant. *See infra*, footnote 7. The district court found that as of March, 1971, five of six slide handler positions were held by blacks. A white employee who had been working as a slide handler was reassigned to an easier and more desirable repacking job, although he was junior in seniority to all of the blacks who shared his position. After the slide was moved to the warehouse, two relatively easy jobs were created and the two most senior employees working at the slide received those positions. When one of these two employees was injured, a white replaced him, despite the fact that a black in the same position on the slide had more seniority.

V.

On April 1, 1976, the district court held a hearing to consider entry of a proposed consent decree. In response to notice of the proposed decree, fifty-two members of the certified class appeared through separate counsel at the hearing. These class members objected to the entry of the proposed consent decree. After hearing arguments from Fisher, the Company, and the "objectors," the court disapproved the proposed consent decree and set this action for trial. Prior to trial, the court ordered that an attorney other than Fisher's could "represent the objectors in this class action and need not formerly intervene." The Company now challenges the award of reasonable attorney's fees to the "objectors" attorney. According to the Company, the objectors are not "prevailing parties" to this suit within the meaning of section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k). Section 706(k) provides: "In any action or proceeding under this [Title] the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . .." We have often declared that "an award of attorneys' fees and its calculation in a Title VII action are matters left for the sound discretion of trial judges." *Claiborne* v. *Illinois Central Railroad*, at 155; *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437 (5th Cir. 1974); *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). The Supreme Court in *Christianburg Garment Co.* v. *EEOC*, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978), perceived two equitable considerations supporting the award of attorney's fees to prevailing Title VII plaintiffs:

> First, as emphasized so forcefully in *Piggie Park*, [*Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968)] the plaintiff is the chosen instrument of Congress to vindicate "a policy that Congress considered of the highest priority." 390

> U.S. at 402, 88 S.Ct. 964. Second, when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law.

Id. at 418, 98 S.Ct. at 699.

In light of the public rights involved, "the award should be in such an amount to insure that attorneys will undertake representation in this type of case." *Baxter* v. *Savannah Sugar Refining Corp.*, at 447.

We are satisfied that under the broad discretion vested in the court by virtue of section 706(k), the district court was justified in granting attorney's fees to the "objectors." The objectors were plaintiff class members who performed a valuable service for the class of which they were a part. In opposing the consent decree in a case in which the plaintiffs ultimately prevailed at trial, the objectors benefited their class and helped to vindicate the important public rights protected by Title VII. The court permitted the objectors to participate in the trial of this cause through their own counsel, without having to formally intervene. The better practice would have been for the trial court to have formally recognized and certified the objectors as a subclass, and we conclude that this is what in fact, though informally, occurred here. Since this is so, we do not disturb this award. We note, however, that in following this course under the circumstances of this case we in no sense countenance any general or unsupervised proliferation of class representation. Here the matter was called to the court's attention and passed on by it, albeit informally. In the normal case, a certified class is assumed to be sufficiently harmonious and unified in interest that one set of attorneys can and should represent it adequately; and just insofar as those attorneys fail to do so to such an extent that additional counsel must appear, the first set must be viewed as having performed inadequately.

VI.

Finally, the Company argues that the district court erroneously attempted to remedy practices not found to be discriminatory. As noted, the court ordered the Company to prepare a proposed plan in conformity with the court's conclusions. The proposed plan has been withheld pending the outcome of this appeal. In this opinion we have dealt with the Company's challenges to those conclusions, and note simply that the court's directions regarding the plan shall be modified to meet the scope of this decision.

AFFIRMANCE AND REMAND

The district court's judgment with respect to the bona fide nature of the Company's seniority system, and the practices relating to hiring into management, is vacated. In all other respects the judgment is affirmed. The case is remanded for proceedings consistent with this opinion.

AFFIRMED in part; VACATED and REMANDED in part.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CA 3-74-679-B

DENNIS FISHER

vs.

THE PROCTER & GAMBLE MANUFACTURING CO.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

(filed April 20, 1977)

The above styled and numbered cause came on for trial before the Court without a jury on January 11, 1977. Plaintiff Dennis Fisher, Defendant the Procter & Gamble Manufacturing Company, and the Objectors with their attorneys were present. Evidence was presented and arguments heard. The Court, after considering the evidence and exhibits, the pre- and post-trial briefs, and other papers filed in connection with the cause, finds and concludes as follows:

FINDINGS OF FACT

1. Plaintiff Dennis Fisher is a black citizen of the United States and a resident of Dallas, Texas.

2. Defendant The Procter & Gamble Manufacturing Company is a corporation engaged in interstate commerce, organized and existing under the laws of the State

of Ohio, and doing business in the State of Texas. Defendant's Dallas plant is located at 1226 Loomis Street and employs over 500 people.

3. Dennis Fisher has been employed at defendant's Dallas plant since December 11, 1967.

4. Dennis Fisher filed a charge with the Equal Employment Opportunity Commission (EEOC) against defendant on March 10, 1971.

5. Dennis Fisher was issued an EEOC "right to sue" letter on May 24, 1974, and instituted this action in this Court on July 18, 1974.

6. Dennis Fisher represents the class consisting of all black persons who presently are employed or since March 10, 1971, have been employed by defendant at its Dallas plant and those who in the future apply for employment with defendant at its Dallas plant, who have been or will be affected adversely by the practices complained of in the Second Amended Complaint.

7. The Objectors are 52 persons who are part of the certified class, but who objected to the entry of a Proposed Consent Decree, which proposed decree this Court disapproved by Order of April 1, 1976.

8. The collective bargaining agreement between defendant and the Independent Oil and Chemical Workers of Dallas (Union) provides that, where ability and merit, as judged solely by the employer, are approximately equal, plant seniority is the governing factor in both promotions and demotions.

9. The collective bargaining agreement provision discussed in Finding of Fact (F.F.) #8 does not apply to either management or security guard positions.

10. Ultimately, all promotions must be approved by both the Industrial Relations Manager and the Plant Manager.

11. "Total assessment" is the term used to describe a process, initiated in 1973, whereby applicants for certain positions are rated and selected for those positions. In addition to written aptitude tests, the process involves several elements. One or more managers of the applicant in his present job fill out forms in which they describe, generally using examples, their views of the applicant's job performance. On the form, those same managers also make recommendations as to the applicant's suitability for the job he is seeking. If two or more managers indicate that they "do not recommend" the applicant, the assessment will not continue. Other sources, such as the applicant's Personnel Record Card and Performance Appraisals by managers, are gathered. The applicant fills out a form in which he describes experiences, including job-related experiences, he has had. Two managers, one having responsibility for the job to be filled and one involved in employment matters, interview the applicant. Independently, the interviewers prepare a profile of the applicant, rating him on a scale from 1 to 7 on the various "what counts" factors for the job sought—that is, on the factors deemed significant to that job's performance. Also, overall ratings are given. Finally, the two profiles are melded and a single overall rating is given. The four rating possibilities are "strong", "acceptable", "borderline", and "weak".

12. A rating of 1 to 7 on such "what counts" factors as "desire to do the work well", "working well with others", and "learning the work" involves substantial subjectivity. This subjectivity is enhanced when the sources from which the ratings are made, such as management's Performance Appraisals, the interview, and the current managers' employee description, likewise involve subjectivity and the opportunity to choose which events to emphasize or omit.

13. The experiences form, filled out by the applicant, emphasizes writing ability, though the interview allows deficiencies in that area to be overcome somewhat.

14. When this action was filed, no black manager had participated as a rater in total assessment for promotion. At the completion of the trial in this action, no black manager had been a rater in total assessment for promotion in which a final selection had been made.

15. Generally, under total assessment, a senior applicant rated acceptable will be selected over a junior applicant rated strong, but a junior applicant rated acceptable will be selected over a senior applicant rated borderline.

16. For other non-management positions and for all non-management positions before the institution of the total assessment and testing programs, seniority is and was the primary factor in decisions on promotions. Prior to the institution of total assessment for mechanical, lab, and high level operator jobs, the MA, CM, and PCT tests were also factors in promotion decisions.

17. Approximately 12.8% of the total workforce in the Dallas-Fort Worth Standard Metropolitan Statistical Area is black.

18. No black employees were hired by defendant until sometime in the 1960's.

19. The earliest seniority date for a current black employee at defendant's plant is August 8, 1966. As of January 1, 1977, 239 white employees had more seniority than this most senior black employee. 118 white employees have seniority dates in the 1940's.

20. On January 31, 1966, blacks constituted .5% of defendant's total employment. By March 1, 1971, this percentage had risen to 8.7%. On January 1, 1977, blacks constituted 14.7% of defendant's total employment.

21. Those people hired for defendant's management positions, including supervisors, are initially hired into management in two ways: (a) by hiring recent college graduates from outside the company; and (b) by promotion from non-management positions within the plant. The bulk of newly hired managers are recent college graduates from outside the plant, primarily those with engineering or other technical degrees.

22. Non-management employees being considered for promotion to management must go through total assessment, including the taking of the PM test.

23. Until sometime in 1970, defendant had never employed a black manager. On March 1, 1971, one of defendant's 77 management employees was black. That is, blacks constituted 1.3% of management. At the time this action was filed, one of 63 (1.6%) management positions was held by a black. At the same time, 11.8% of defendant's employees were black. On January 1, 1977, 4 of 69 (5.8%) management positions were held by blacks. The only other black manager that defendant has employed left in 1972.

24. From September 11, 1970, to January 1, 1977, 33 new managers were hired from outside the plant or promoted from the non-management ranks. Four (12.1%) were black. From September 11, 1970, to the time this action was instituted, there were 17 new managers, one (5.9%) of whom was black.

25. The position of supervisor, or line manager, is of critical importance in defendant's plant, especially in matters such as promotion, discipline, and good relations, including racial relations, between management and non-management and among non-management employees. When this action was instituted in 1974, no black person had ever been a supervisor at defendant's plant. At the time of trial, two blacks were supervisors.

26. There are 8 positions at the operations manager level. No black person has ever held any of these positions.

27. In March, 1976, Miles Millsap, defendant's plant manager, told Anthony Lowery and Alvin Loftis, two objectors in this action, that the white employees would have to approve whomever defendant selected as the first black supervisor.

28. In 1970, Eugene Fields, who is black, sought a management position and was rejected, despite his being qualified for the job. The reason given for the rejection was that he was overqualified.

29. Usually, a non-management employee seeking promotion to management must have approximately 20 years experience. In 1976, ten days before a subsequently postponed trial date in this cause, Gene Washington, a black, was promoted to management with only 9 years experience. He is the only black ever to have been promoted from the non-management ranks.

30. At the time this action was filed, 27 of the 63 (42.9%) management positions were filled by people without a 4-year degree.

31. Defendant recruits managers at predominantly white schools such as The University of Texas and Texas A & M every year, but recruits at Prairie View A & M and Southern University, both predominantly black colleges, only periodically, not every year.

32. Six pay levels (A-F) exist for non-management positions. Beginning with the lowest and progressing to the highest the levels are: A (Specialist 1); B (Specialist 2); C (Specialist 3); D (Technician 1); E (Technician 2); and F (Technician 3).

33. With few exceptions, non-management employees are hired into entry level positions with promotion to higher level positions being made from a pool of those non-management employees already working in defendant's plant.

34. An exception to the policy described in F.F. #33 was made in the case of W.H. Barber. Mr. Barber, who is white, was hired as a temporary maintenance mechanic at a D rate on February 22, 1971, and eventually became a permanent employee.

35. When a vacancy for a non-management position occurs, notice of the vacancy and intent to fill it is posted. Those employees who want to be considered for the job must sign their names on the notice. Also, they must attend a meeting at which the vacancy will be discussed, though the vacancy notice does not indicate that attendance is mandatory. Using seniority, defendant selects from among the applicants who have not withdrawn their bids a group which then will go through total assessment. If an acceptable applicant is found in this group, the more junior applicants will not go through total assessment. If an acceptable applicant is not found in the first totally assessed group, defendant, again using seniority, selects another pool of applicants to totally assess. This process continues until an acceptable bidder is found.

36. On March 1, 1971, blacks constituted 10.1% of the non-management employees. On January 1, 1977, they constituted 16.1% of such employees.

37. As of January 1, 1977, 35.5% of defendant's current non-management employees having seniority dates after July 1, 1966, were black.

38. From March, 1961, to March, 1966, no permanent non-management employees were hired. However, five

white non-management employees were hired on a temporary basis and, after March 1, 1966, were given permanent employee status. Despite numerous job applications by blacks during the five year hiatus in permanent hiring, no evidence was presented that any blacks were hired on a temporary basis during that time.

39. The mechanical, lab analyst, and high level operator jobs are of critical importance in the operation of defendant's plant.

40. One of the 76 (1.3%) mechanical jobs is held by a black.

41. Non-management employees being considered for promotion into non-management mechanical jobs must go through total assessment, including the taking of the MA test.

42. Of 30 mechanical jobs filled, using the MA test, from December, 1967, until January 1, 1977, 2 (6.7%) were filled by blacks. Both of these blacks had 1966 seniority dates. Of 14 such jobs filled since implementation of total assessment, one (7.1%) was filled by a black.

43. Blacks hold none of the 22 lab analyst jobs.

44. Non-management employees being considered for promotion into non-management lab jobs in the main lab must go through total assessment, including the taking of the CM test.

45. Of 24 lab analyst jobs filled, using the CM test, from December, 1967, until January 1, 1977, one (4.2%) was filled by a black. Since implementation of the total assessment process for lab analyst jobs, only one job has been filled and that was by a white.

46. Non-management employees being considered for promotion into non-management high level operator jobs must go through total assessment, including the taking of the PCT and the MA tests.

47. Of 34 high level operator vacancies filled since implementation of total assessment for high level operator jobs, 12 (35%) have been filled by blacks. Of the 21 high level operator vacancies bid between the implementation of total assessment and the filing of this action, 6 (28.6%) were filled by blacks.

48. As of March 29, 1971, blacks held none of the 41 clerical jobs. Since then, defendant's annual EEO-1 forms (Employer Information Reports) never have indicated more than one black holding a clerical position. As of January 19, 1976, only 1 of 29 (3.4%) clerical positions was filled by a black.

49. Of 8 manufacturing clerical jobs filled, using the CM test, from December, 1967, to January 1, 1977, none has been filled by a black.

50. Defendant has never employed a black security guard.

51. Of 12 security guard jobs bid from September, 1970, until January 1, 1977, only one black was selected, but he subsequently withdrew his bid.

52. For non-management employees with seniority dates after July 1, 1966, blacks have higher average annual earnings than whites.

53. The position of "slide handler" is one of the least desirable jobs in defendant's plant.

54. As of March 1, 1971, of the 6 slide handler positions, 5 (83.3%) were held by blacks. This was at a time when blacks constituted 8.7% of defendant's total employment. *See* F.F. #20.

55. Monty Walker, a white, who was working as a slide handler, was reassigned to an easier, more desirable repacking job, despite his being junior to the blacks, who constituted all the other people working on the slide.

56. After the slide was moved to the warehouse, two load former positions—relatively easy jobs—were created and the two most senior employees got them. When one of these two people was injured, Zeke Fraley, a white, replaced him, despite the fact that Herbert Stewart, a black in the same position on the slide as Fraley, had more seniority.

57. Before and during the pendency of this action, defendant's management has viewed blacks as inferior to whites, as exemplified by the following facts:

(a) John Coley, a white, who was the supervisor of James Robinson, told Robinson that he (Coley) was a racist;

(b) In 1971, Bill Phillips, a white manager in the Crisco department, told Clyde Carr, a black employee, that blacks were not capable of performing the higher rated jobs;

(c) In 1972, at a management seminar, John Coley said he felt himself better than blacks, Bill James, a manager, said he was opposed to interracial marriages, and Dave Ricker, a white manager, said that blacks living in an area make property values decline;

(d) Max Cox, who is the Industrial Relations Manager and who is white, said blacks need more training for positions than whites becauses whites are more accustomed to working in industry; and

(e) In a March 9, 1976, management meeting Bill Smith, a manager, said that preventing non-management white employees from making racial slurs would be difficult, since upper management had made such slurs many times.

58. Incidents periodically have occurred in which racial slurs have been directed at defendant's black employees.

59. Defendant itself has recognized its shortcomings in the area of racial relations and the difficulties faced by blacks, as exemplified by the following facts:

(a) Donald Berg, a white manager in the food packing room, said that, if he were black, he would find it difficult to work in defendant's plant or in any other type of manufacturing firm;

(b) In March, 1976, R. S. Cook, the manufacturing manager for the food division at Procter & Gamble's main office in Cincinnati, Ohio, told a group from defendant's plant that the company had not been doing enough in its affirmative action programs; and

(c) In late 1976, Waldo Jeff, from the Personnel Development Department in Procter & Gamble's Cincinnati office, submitted a report which, among other things, said that "[t]he pending court suit has increased barriers to racial harmony" in defendant's plant.

60. Defendant has taken some affirmative steps to address the problems discussed in F.F. #'s 57, 58, and 59 through management seminars, including seminars addressing the issue of race through such methods as role playing and films.

61. The MA, CM (insofar as it is used for lab analyst positions), and PCT tests have been validated in accordance with the 1970 EEOC Testing and Employment Selection Guidelines.

62. A 1961 criterion-related validation study for the CM test relating to selection for manufacturing clerical

positions did not involve separate validation for minority and non-minority job candidates.

63. A 1975 criterion-related validation study for the CM test relating to selection for manufacturing clerical positions found no statistical or practical significance in the correlation of test scores and job performance for blacks or for white males.

64. The PM test has content validity for only certain components of the job of first line supervisor. It does not have content validity for the majority of job factors deemed most significant in the job analyses performed for supervisorial positions. No criterion-related validation study has been made for the PM test.

65. In each instance in which plaintiff Dennis Fisher bid on but was not selected for a job, the employee selected had more seniority, a higher test score, a higher rating under total assessment, or some combination of these three elements.

Conclusions of Law

1. Reading plaintiff's EEOC charge with the liberality required, *see, e.g., Tillman* v. *City of Boaz*, 548 F.2d 592 (5th Cir. 1977), *and Sanchez* v. *Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970), continuing discrimination by defendant in all areas involved in this action was charged. *Belt* v. *Johnson Motor Lines, Inc.*, 458 F.2d 443 (5th Cir. 1972); *Egelston* v. *State University College at Genesco*, 535 F.2d 752 (2d Cir. 1976).

2. Plaintiff's filing of the EEOC charge was timely.

3. This Court has jurisdiction of this cause under 42 U.S.C. §2000e *et seq.* (Title VII of the Civil Rights Act of 1964, as amended) and 42 U.S.C. §1981.

4. This cause is brought properly as a class action pursuant to Federal Rule of Civil Procedure 23(a) and

(b)(2), in that the class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of plaintiff Dennis Fisher are typical of those of the class he represents; and Dennis Fisher adequately and fairly protects the interests of the class.

5. Evidence of events and incidents transpiring prior to September 10, 1970, is relevant and admissible to show possible plantwide discriminatory conduct with continuing effects, the probability of the continuation of such conduct, and the relationship between past actions and present effects and actions. *Swint* v. *Pullman-Standard*, 539 F.2d 77 (5th Cir. 1976); *Burns* v. *Thiokol Chemical Corp.*, 483 F.2d 300 (5th Cir. 1973).

6. Miles Millsap's statement to Anthony Lowery and Alvin Loftis, concerning white approval of the first black supervisor, is admissible, and not excludable under Federal Rule of Evidence 408. *See* 4 Wigmore, *Evidence* §1061(c), 39-42 (Chadbourn rev. 1972).

7. In the past, defendant discriminated against blacks in both hiring and promotions.

8. Defendant does not have a bona fide seniority system within the meaning of 42 U.S.C. §2000e-2(h).

9. Defendant demonstrated no business necessity for its policy of recruiting only recent college graduates with engineering or technical degrees, nor for its policy of usually requiring 20 years experience of those employees it considers for promotion from non-management to management positions.

10. Defendant discriminated against the plaintiff class in its practices relating to promotion to and hiring into management.

11. Defendant discriminated against the plaintiff class in its practices relating to promotion to mechanical positions.

12. Defendant discriminated against the plaintiff class in its practices relating to promotion to lab analyst positions.

13. Defendant did not discriminate against the plaintiff class in its practices relating to promotion to high level operator positions.

14. Defendant discriminated against the plaintiff class in its practices relating to promotion to manufacturing clerical positions.

15. Defendant discriminated against the plaintiff class in its practices relating to promotion to security guard positions.

16. Defendant did not discriminate against the plaintiff class in terms of compensation.

17. Defendant discriminated against the plaintiff class in its practices relating to job assignments by assigning blacks to the least desirable jobs.

18. The MA, CM (insofar as it is used for lab analyst positions), and PCT tests are professionally developed ability tests within the meaning of 42 U.S.C. §2000e-2(h).

19. The CM test for manufacturing clerical positions has not been proven to be a professionally developed ability test within the meaning of 42 U.S.C. §2000e-2(h).

20. The PM test, when not used in conjunction with a valid total assessment program, has not been proven to be a professionally developed ability test within the meaning of 42 U.S.C. §2000e-2(h). *See Firefighters Institute for Racial Equality* v. *City of St. Louis*, 549 F.2d 506, 512 (8th Cir. 1977).

21. The total assessment program is not a valid method for evaluating employees' qualifications for promotion as long as blacks are so disproportionately underrepresented in defendant's management, especially at the

supervisorial level. *See Swint* v. *Pullman-Standard*, 539 F.2d 77, 105 n.72 (5th Cir. 1976) *and United States* v. *City of Chicago*, 549 F.2d 415, 432 (7th Cir. 1977).

22. Plaintiff Dennis Fisher was not discriminated against because of race in a manner different from that in which the class was discriminated against.

23. The members of the class of blacks whom defendant discriminated against in its promotional policies relating to management, mechanical, lab analyst, manufacturing clerical, and security guard positions are entitled to compensation, which will be determined at a later hearing. *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 256-58 (5th Cir. 1974).

24. If defendant continues to use the CM test for manufacturing clerical positions, it shall, within a reasonable time, devise a test which fully meets the EEOC Guidelines concerning criterion-related validation.

25. The PM test shall not be used for selection of non-management employees for management positions, unless it is used in conjunction with a valid total assessment program.

26. Henceforth, defendant must include on any posted vacancy notice a statement to the effect that attendance at the meeting of bidders to discuss the vacancy is mandatory.

27. Within 30 days of the entry of these Findings of Facts and Conclusions of Law, plaintiff and defendant shall submit to this Court proposed affirmative action plans for defendant. The parties may submit an agreed upon plan instead of separate, proposed plans. Any such plan or plans shall include provisions relating to: training programs; opportunities for college training or training at a technical institute; goals for promotion of blacks into the positions in which defendant has been found to have

discriminated; clear explanations to the non-management employees of the selection procedures for promotions, including explanations of the roles played by the PM, MA, CM, and PCT tests; disciplinary procedures; plans for reduction of racial tensions at defendant's plant; and plans for making defendant's management personnel more aware of and sensitive to the situation of black employees.

28. The plaintiff class and the Objectors are entitled to reasonable attorneys' fees, which will be determined at a later hearing.

29. Any finding of fact deemed a conclusion of law is so adopted. Any conclusion of law deemed a finding of fact is so adopted.

SIGNED and ENTERED this 20 day of April, 1977.

/S/ [SARAH T. HUGHES]
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CA 3-74-679-B

DENNIS FISHER

vs.

THE PROCTER & GAMBLE MANAUFACTURING CO.

JUDGMENT

(Filed April 20, 1977)

On this the 20th day of April, 1977, the Court enters judgment in the above styled and numbered cause based on its Findings of Facts and Conclusions of Law this day filed.

It is ORDERED, ADJUDGED, and DECREED that:

1. Defandant, the Procter & Gamble Manufacturing Company, is ordered to pay the plaintiff class, represented by Dennis Fisher, such compensation as may be determined by this Court at a later hearing for discrimination in its promotion practices;

2. Defendant, the Procter & Gamble Manufacturing Company, is ordered to include on any posted vacancy notice a statement to the effect that attendance at the meeting of bidders to discuss the vacancy is mandatory;

3. Defendant, the Procter & Gamble Manufacturing Company, is ordered to devise a test, if it uses a test, for manufacturing clerical positions which fully meets the EEOC Guidelines concerning criterion-related validation;

4. Defendant, the Procter & Gamble Manufacturing Company, is ordered to not use the PM test for selection of non-management employees for management positions, unless it is used in conjunction with a valid total assess-

5. Plaintiff Dennis Fisher and defendant, the Procter & Gamble Manufacturing Company, are directed, within thirty (30) days to prepare and file either proposed affirmative action plans or a single affirmative action plan for defendant, containing the elements delineated in the Court's Conclusions of Law;

6. Defendant, the Procter & Gamble Manufacturing Company, is ordered to pay the attorney for Dennis Fisher and the class he represents and the attorney for the Objectors attorneys' fees, which will be determined by this Court at a later hearing.

Costs against defendant, the Procter & Gamble Manufacturing Company.

/S/ [SARAH T. HUGHES]
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CA 3-74-679-B

DENNIS FISHER

vs.

THE PROCTER & GAMBLE MANUFACTURING CO.

ORDER AMENDING
FINDINGS OF FACTS AND
CONCLUSIONS OF LAW

(Filed May 6, 1977)

On this the 6th day of May, 1977, came on for consideration Plaintiff's Motion to Amend Findings of Fact and a portion of Defendant's Motion to Amend Findings of Facts and Conclusions of Law, filed on May 5, 1977.

It is hereby ORDERED, ADJUDGED, and DECREED that the Court's Findings of Facts and Conclusions of Law, entered on April 20, 1977, be amended as follows:

Finding of Fact #22 is amended to read:

"22. Non-management employees being considered for promotion to management must go through total assessment, including the taking of the PM test. This total assessment differs in some respects from the total assessment used for promotions to non-management positions."

Finding of Fact #52 is amended to read:

"52. For non-management employees with seniority dates after July 1, 1966, blacks averaged more gross earnings in 1976 than whites."

SIGNED and ENTERED this 6th day of May, 1977.

/S/ [SARAH T. HUGHES]
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action
No. CA 3-74-679-B

DENNIS FISHER

vs.

THE PROCTER & GAMBLE MANUFACTURING CO.

AMENDED JUDGMENT

(Filed May 19, 1977)

Upon request of the Defendant that the Judgment of this Court be amended to include the certification permitted under 28 U.S.C. §1292(b), the Court on this 19 day of May, 1977, hereby amends its Judgment, previously entered in the above styled and numbered cause on April 20, 1977 based on its Findings of Facts and Conclusions of Law originally filed on April 20, 1977 and subsequently amended on May 6, 1977, to read as follows:

IT IS ORDERED, ADJUDGED AND DECREED that:

1. Defendant, THE PROCTER & GAMBLE MANUFACTURING COMPANY, is ordered to pay the Plaintiff class, represented by DENNIS FISHER, such compensation as may be determined by this Court at a later hearing for discrimination in its promotion practices;

2. Defendant, THE PROCTER & GAMBLE MANUFACTURING COMPANY, is ordered to include on any posted vacancy notice a statement to the effect that attendance at the meeting of bidders to discuss the vacancy is mandatory;

3. Defendant, THE PROCTER & GAMBLE MANUFACTURING COMPANY, is ordered to devise a test, if it uses a

test, for manufacturing clerical positions which fully meets the EEOC Guidelines concerning criterion-related validation;

4. Defendant, THE PROCTER & GAMBLE MANUFACTURING COMPANY, is ordered to not use the PM test for selection of non-management employees for management positions, unless it is used in conjunction with a valid total assessment program;

5. Plaintiff, DENNIS FISHER, and Defendant, THE PROCTER & GAMBLE MANUFACTURING COMPANY, are directed, within thirty (30) days from April 20, 1977, to prepare and file either proposed Affirmative Action Plans, or a single Affirmative Action Plan for Defendant, containing the elements delineated in the Court's Conclusions of Law;

6. Defendant, THE PROCTER & GAMBLE MANUFACTURING COMPANY, is ordered to pay the attorney for DENNIS FISHER and the class he represents and the attorney for the Objectors attorneys' fees, which will be determined by this Court at a later hearing.

7. Costs against Defendant, THE PROCTER & GAMBLE MANUFACTURING COMPANY.

This Judgment Order involves controlling questions of law as to which there is substantial ground for differences of opinion and an immediate appeal from this Judgment Order and the Findings of Facts and Conclusions of Law upon which it is based may materially advance the ultimate termination of the litigation. Therefore, the Court does hereby CERTIFY this matter as one included within 28 U.S.C. §1292(b).

SIGNED AND ENTERED this 19 day of May, 1977.

/S/ [SARAH T. HUGHES]
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CA 3-74-679-B

DENNIS FISHER

vs.

THE PROCTER & GAMBLE MANUFACTURING CO.

ORDER PROVIDING FOR AN AFFIRMATIVE ACTION PLAN
IN DEFENDANT'S DALLAS PLANT

(filed May 31, 1977)

The Plaintiff Dennis Fisher filed a Complaint on July 18, 1974, against the Defendant Procter & Gamble Manufacturing Company (hereinafter sometimes referred to as the "Company" or "Procter & Gamble"), alleging violation of Title VII of the Civil Rights Act of 1964, as amended, and 42 U.S.C. §1981 at Defendant's Dallas plant.

On April 20, 1977, the Court entered its Findings of Facts and Conclusions of Law, in which the Court found that Defendant has discriminated against black persons on the basis of their race. Based on said Findings and Conclusions judgment was entered on May 19, 1977, amending a judgment previously entered on April 20, 1977. In compliance with said judgment, Plaintiff and Defendant each filed a proposed affirmative action program. The Court having considered same ORDERS, ADJUDGES, and DECREES that the following affirmative action program be forthwith implemented at Defendant's Dallas plant.

I.
GOALS, TIMETABLES, INTERIM PREFERENTIAL RELIEF MANAGEMENT POSITIONS

A. Defendant is directed to immediately implement plans to achieve the following goals:

1. The achievement of work-force parity for black persons in the company's management positions on or before June 30, 1980. (Work-force parity means that the percentage of blacks in a particular job category is substantially equivalent to the percentage of blacks in the company's total work-force.)

2. The achievement of work force parity for black persons in line management (supervisor) positions on or before June 30, 1980.

B. The Court finds that the following interim preferential relief is necessary in order to remedy the effects of present and past discrimination against black persons.

1. Of the next three vacancies in any of the eight positions at the Operations Manager level, at least one shall be filled by a black person. In the event that a black person becomes Plant Manager of the Dallas plant, this requirement will be deemed to be satisfied.

2. At least one of the next three vacancies in line manager (or supervisor) positions shall be filled by a black person.

C. Defendant shall immediately promulgate written job or position descriptions for each distinct management-level job classification. Copies of such descriptions shall be filed with the Court and served upon counsel for Plaintiff within 90 days of this Order.

D. Defendant shall promulgate in writing non-discriminatory qualifications for each distinct

management-level job classification. Copies of such qualifications shall be filed with the Court and served upon counsel for Plaintiff within 90 days of this Order.

E. If any of the present management-level job classifications are extinguished or if the nature of the job category changes or if new positions are created, Defendant shall notify and shall provide the Court and counsel for Plaintiff when applicable, with new or supplemental job descriptions and/or job qualifications.

F. Defendant shall recruit for management every year at colleges with a proportionately high black enrollment.

G. Defendant shall train and utilize black persons as recruiters.

H. Through counseling and other appropriate means, Defendant shall encourage and assist black non-management employees to seek promotion into management positions.

I. Any black employee who is promoted from non-management into management shall be entitled to return to his or her former non-management job or its substantial equivalent with no loss of seniority, in the event that his or her job performance in the management job is unsatisfactory. This provision shall not apply if such a black employee's job performance in the management job is unsatisfactory because of excessive absenteeism or intentional failure to try to perform the work satisfactorily. Additionally, this provision shall remain effective until Defendant achieves work-force parity for black persons in its management positions.

J. Defendant shall document all offers of management positions made to black persons from outside the Dallas plant. Defendant shall record (1) the name and address of the offeree; (2) the date the offer was extended;

(3) the company or institution from which the offeree was recruited; (4) degrees, if applicable; and (5) if rejected, the reason given by offeree.

MECHANICAL JOBS

A. Defendant shall implement plans to achieve the following goals:

1. The achievement of work-force parity for black persons in the mechanical jobs on or before June 30, 1980.

2. The selection of at least four black persons as Mechanical Trainees (Tech. I) by August 31, 1977.

LAB ANALYST JOBS

A. Defendant shall implement plans to achieve the following goals:

1. The achievement of work force parity for black persons in the Lab Analyst positions on or before June 30, 1980.

B. The Court finds that the following interim preferential relief is necessary in order to remedy the effects of present and past discrimination against black persons:

1. At least one of the next three vacancies in the Lab Analyst positions shall be filled by a black person.

C. Defendant shall, if necessary, develop a Lab Analyst Trainee position to assist the entry of black employees into Lab Analyst positions. If such a Lab Analyst Trainee position is created and black persons are employed in that position, ¶B.1. of "LAB ANALYST JOBS" is modified so that at least two of the next four vacancies shall be filled by black persons. This does not modfiy the requirements of ¶A.1. of "LAB ANALYST JOBS".

CLERICAL JOBS

A. Defendant shall implement plans to achieve the following goals:

1. The achievement of work force parity for black persons in the clerical job classifications on or before June 30, 1980.

2. The selection of black persons to fill at least two of the next three vacancies in the clerical job classifications.

B. The Court finds that the following interim preferential relief is necessary to remedy the effects of present and past discrimination against black persons: Of the next nine vacancies in the clerical job categories, at least four shall be filled by black persons.

SECURITY GUARD JOBS

The Court finds that the following interim preferential relief if necessary in order to remedy the effects of present and past discrimination against black persons: At least one of the next two vacancies in the job category of Security Specialist III shall be filled by a black person.

II.

TRAINING PROGRAMS AND EDUCATION

A. Defendant will continue to counsel black employees and encourage them to utilize the Defendant's Employee Education Plan for reimburement for appropriate high school, vocational or trade school or college level courses. Defendant will also counsel, or arrange for such counseling through appropriate community resources, black employees interested in college training with respect to the type and scope of college training to undertake.

B. Defendant shall amend its Employee Education Plan, if necessary, to include courses designed to improve reading, reading comprehension, verbal skills, arithmetic skills, and vocabularly.

C. Within 30 days from the entry of this Order, Defendant shall submit to the Court and counsel for Plaintiff and the Objectors a proposed written communication to all black employees (and the other employees if Defendant so desires) explaining the Company's Employee Education Plan, including all requirements an employee must satisfy in order to utilize the plan. Upon Court approval of the proposed communication, it shall be sent to all of the Company's black employees, as well as the other employees if Defendant so desires.

D. The company shall provide career counseling for all black employees.

III.

Disciplinary Procedures

A. Defendant shall, within 60 days of the entry of this Order, establish clear written explanations of all formal and informal rules and regulations, together with explanations of the disciplinary procedures involved in enforcing said rules and regulations.

B. Copies of all such rules and regulations, including, if applicable, the Company's interpretations of provisions of the Union contract, shall be maintained in the Defendant's Personnel Office and made available for inspection by Defendant's black employees, as well as other employees if Defendant so desires.

C. The Company shall within 60 days of the entry of this Order file with the Court a listing and explanation of

all types of personnel records which it presently maintains or has maintained since January 1, 1977.

IV.

Racial Relations

A. Defendant shall employ a consultant of national reputation in conjunction with its own personnel to assess the current situation as well as trends in employee relationships, including racial relationships, within its Dallas plant, and to advise in the development of a program based on the results of such assessment for the purpose of reducing racial tensions within the plant. Defendant will develop and implement such a program which would include provisions for all employees, including black employees, to express their ideas and concerns relating to the relationships among its plant employees. Within 30 days of the entry of this Order, the Company shall advise the Court and counsel for Plaintiff and the Objectors of the name and address of the person that the Company proposes to retain. Plaintiff and Objectors shall have 10 days in which to file written objections to the person selected. In the event the Court determines that any such objections are well-founded the Court will appoint the consultant. Copies of all reports and recommendations of the consultant shall be served upon counsel for Plaintiff and the Objectors.

B. The Company shall immediately communicate to all employees (including management level employees) the fact that Defendant will not tolerate racist slurs or remarks.

C. Defendant shall continue its efforts to promote racial harmony through such means as management seminars. In planning and executing such programs, Defendant shall seek imput from the black managers at the Dallas plant.

D. Defendant shall investigate any complaints concerning racist remarks and shall document all such complaints and investigations.

V.

COMMUNICATIONS

A. Within 30 days of the entry of this Order, Defendant shall hold a policy orientation for all managers and supervisors. At such orientation session, Defendant shall explain to the managers and supervisors the terms and effects of this Order.

B. Within 30 days from the entry of this Order, Defendant shall file with the Court and serve upon counsel for Plaintiff and Objectors, a proposed written communication to the non-management black employees (and to the other non-management employees if Defendant so desires) which explains in clear terms the selection procedures utilized by Defendant including the roles played by the PM, MA, CM, and PCT tests. Upon the Court's approval of the proposed communication, it shall be sent to each of Defendant's non-management black employees and to the other non-management employees if Defendant so desires.

VI.

RATE RETENTION

Any black employee who is promoted or transferred into a management position, a mechanical position, or a Lab Analyst position shall at no time be paid at a lower rate than the rate for the job from which he or she was promoted or transferred. The black employee so promoted or transferred shall continue to receive those general pay increases he or she would have received had he or she

remained in his or her prior job. Rate retention shall continue until he or she reaches that level in his or her current job wherein the rate of pay is equal to that in the job from which he or she transferred. He or she shall then progress according to the rate of pay in his or her current job category.

VII.

Overseer

A. Within 30 days of entry of this Order, Defendant shall designate a person to oversee compliance with this Order. Said person may not be the Industrial Relations Manager but may be a person from Defendant's main office in Cincinnati, Ohio. Counsel for Plaintiff and Objectors may file with the Court written objections to the designated overseer within 10 days of his designation.

B. In addition to ¶VII.A. above, the overseer periodically shall make himself available to the black employees for the purpose of considering any allegations of discrimination on a confidential basis.

VIII.

Records and Reports

A. The Company shall maintain adequate records to establish its compliance with the terms of this Order.

B. Beginning on September 1, 1977, and then on January 1, 1978, and then on June 30th and January 1st of each succeeding year until further order of this Court, the Company shall file with this Court, with copies served upon counsel for Plaintiff and the Objectors, detailed reports

summarizing its progress in meeting the requirements of this Order.

C. Upon receipt of reasonable notice, the Company shall make available for inspection by counsel for Plaintiff and the Objectors, during normal working hours, all records used as a basis for the reports required by this Order. Counsel for Plaintiff and the Objectors shall have the right to copy the records referred to in this paragraph.

IX.

JURISDICTION

The Court will retain jurisdiction over this action for the purpose of effectuating the terms of this Order until further Order of the Court. At any time after entry of this Order, Plaintiff and Objectors on due notice to Defendant, may move the Court for enforcement of this Order. Upon a showing of a need for enforcement of this Order, the Court will order whatever relief it deems appropriate to insure that no person is denied the rights which this Order seeks to protect.

SIGNED and ENTERED this 31st day of May, 1977.

/S/ [SARAH T. HUGHES]
United States District Judge

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

77-2204
Nos. 77-2205
77-2474

D. C. Docket No. CA-3-74-679-B

DENNIS FISHER,
Plaintiff-Appellee,
versus

PROCTER & GAMBLE MANUFACTURING COMPANY,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

Before THORNBERRY, GEE and HATCHETT, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and vacated in part; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that the defendant-appellant pay to the plaintiff-appellee the costs on appeal, to be taxed by the Clerk of this Court.

March 12, 1980

ISSUED AS MANDATE:

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NOS. 77-2204, 77-2205 & 77-2474

DENNIS FISHER,
Plaintiff-Appellee

versus

PROCTER & GAMBLE MANUFACTURING COMPANY,
Defendant-Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

ON PETITION FOR REHEARING AND PETITION
FOR REHEARING EN BANC

(Opinion 3-12-80, 5 Cir., 197 , ____F.2d____).

(filed May 29, 1980)

Before THORNBERRY, GEE and HATCHETT, Circuit Judges.

PER CURIAM:

[X] The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

[ ] The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in

regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.

[ ] A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE
COURT:

/S/ [JOSEPH W. HATCHETT]
United States Circuit Judge

APPENDIX I

STATUTES INVOLVED

TITLE 42—THE PUBLIC HEALTH AND WELFARE

§2000e-2. Unlawful employment practices

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

§2000e-5. Enforcement provisions

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency

A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge

(including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute crim.nal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

§1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(R.S. §1977.)

NO. 80-474

In the Supreme Court of the United States

OCTOBER TERM, 1980

THE PROCTOR & GAMBLE MANUFACTURING COMPANY,
PETITIONER,

v.

DENNIS FISHER,
RESPONDENT.

ON PETITION FOR A WRIT TO CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

PHILIP I. PALMER, JR.
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DALLAS, TEXAS 75250
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ATTORNEYS FOR RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1980

NO. 80-474

THE PROCTOR & GAMBLE MANUFACTURING COMPANY,
PETITIONER,

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DENNIS FISHER,
RESPONDENT.

ON PETITION FOR A WRIT TO CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

Respondent, Dennis Fisher, respectfully submits Brief in opposition to Petitioner's Application for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, and prays that said Petition be denied.

STATEMENT

Although Petitioner's Dallas plant is located in the heart of South Dallas, a predominantly black community, (JA p.163) no black employees were hired until sometime in the 1960's (Finding of Fact #18, Appendix B to the Petition). By January 1, 1977, however, blacks constituted 14.7% of Petitioner's total workforce and 35.5% of all non-management employees having seniority dates after July 1, 1966. (Finding of Fact #20, JAX p.)

In most instances Petitioners non-management employees are hired into various entry level positions requiring few prior skills. Thus with certain limited exceptions the higher level non-management positions are filled by promotion from within the plant. (Finding #33, App. B). The Collective Bargaining Agreement between Petitioner and the Union provides that where ability and merit as judged solely by the employer are approximately equal, plant seniority is the governing factor in both promotions and demotions. (Finding of Fact #8. Appendix B to the Petition).

As a direct legacy of its past refusal to hire black employees, Petitioner's Dallas plant has long suffered from racial tensions and incidents at times involving upper management (App. B. to the Petition. Although in recent years Petitioner has addressed the problem and taken some steps to ameliorate the racial tensions at its Dallas plant, the trial court found that its voluntary actions had not been completely effective and enjoined the Company to take additional measures under court supervision. (App. F to the Petition).

THIS COURT HAS RECOGNIZED THE SUFFICIENCY OF WORKFORCE STATISTICS AS PRIMA FACIE PROOF OF DISCRIMINATION

The central issue raised by the Petition challenges the legal sufficiency of Plaintiff's *prima facie* case of racially discriminatory employment practices. Petitioner contends that Plaintiff's case was insufficient to establish a *prima facie* violation of Title VII because it was based upon current workforce statistics, and therefore did not control for the effects of seniority and pre-Act hiring and promotion decisions.

In *Hazelwood School District v. United States,* 433 U.S. 299, 308 this Court expressly recognized the validity of current workforce statistics as sufficient evidence, *prima facie* of Title VII prohibited discrimination (noting at pp 308-309 that disparities between workforce representations of 1.4% and 1.8% as compared to 5.7% availability figure were on their face substantial). The rationale for accepting such proof *prima facie* as evidence of illegal discrimination was previously articulated by this Court in *Teamsters v. United States,* 431 U.S. 324:

> "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a workforce more or less representative of the racial and ethnic composition of the population in the community from which employees are hired;" at 340 n. 20.

To be sure, *Hazelwood* and *Teamsters* recognize that a *prima facie* showing of discrimination based upon gross workforce disparities can be rebutted by any evidence which establishes a nondiscriminatory explanation for the disparities, such as proof that "the claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination" *Teamsters supra* at p. 360.[1]

Significantly, both *Teamsters* and *Hazelwood* recognize that the burden of factoring out the effects of neutral (in the sense of non illegal) factors such as pre-Act hiring, etc. falls on the employer, not the Plaintiff class. This is not an unfair burden to place on the employer since the employer is clearly in the better position to produce records reflecting such material information as vacancies, qualifications, etc.[2]

Both *Teamsters* and *Hazelwood* recognize that an employer can rebut a *prima facie* showing of racial discrimination based on workforce statistics by proof that

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[1] There is some disagreement whether *Teamsters* represents a disparate impact or disparate treatment theory of Title VII liability Resolution of this nice distinction would appear to have little practical utility since an employer whose "explanation" of apparent discrimination is based upon any neutral practice having adverse impact upon a Title VII protected group would presumably also bear the burden of establishing that such practice was justified as a business necessity within the meaning of *Griggs v. Duke Power Company*, 401 U.S. 424. See *Croker v. Boeing Company*, 437 F. Supp. 1138 1182. (E. D. Pa 1977).

[2] It should also be noted that employers are required by law to maintain adequate records to establish their compliance with Title VII. 42 U.S.C. §2000e-8(c).

its employment decisions *since the effective date of the Act* were made in a completely condiscriminatory way, (emphasis supplied). Petitioner, however, made no effort to establish that all its promotional decisions since July 2, 1965, had been free of racial discrimination. Instead, citing *United Airlines v. Evans*, 431 U.S. 553, Petitioner contended that the only relevant promotional decisions were those that occurred during the period from September 10, 1970 (180 days before Plaintiff filed his EEOC Charge) and January 1, 1977.[3] Thus, Petitioner generally produced no information regarding actual vacancies filled by promotion during the critical period from July 2, 1965 until September 10, 1970.[4]

Closely related to the challenge to Plaintiff's *prima facie* case is Petitioner's argument that Plaintiff failed to establish that the class of black employees were adversely affected by any of its promotional practices, apart from the operation of the seniority system. Again, Petitioner argues that only statistics which control for the effects of seniority, as well as pre-Act hiring and pre limitation period (September 10, 1970) promotion decisions can establish adverse impact. Thus Petitioner argues not only that current force statistics are inadequate to establish adverse impact, but also that the only relevant statistics for this pur-

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[3] The trial of this action began January 11, 1977.

[4] In addition to considering only promotions made after September 10, 1970, Petitioner's analysis assume that all promotions made after that date are of equal weight regardless of their relative proximity to trial.

pose concern those promotions made on or after September 10, 1970 (180 days before Plaintiff filed his EEOC Charge). In addition, Petitioner argues that adverse impact occurs only when a more senior black employee is bypassed for promotion by a junior white employee. Thus Petitioner introduced no analyses which directly controlled for the effects of seniority on its promotional decisions, by comparing the relative number of promotions awarded to the class of black employees with the promotions awarded to their white counterparts (i.e. white employees having similar seniority) See *Swint v. Pulman Standard*, 539 F2d 77 (5th Cir. 1976). Petitioner's approach was thus deficient in two respects: (1) it failed to control for the incidence of promotion among white employees having similar seniority to the Plaintiff class and (2) it included only those employees who actually bid on jobs, thereby excluding from consideration black employees having sufficient seniority who were deterred from bidding on certain jobs by their belief that they could not satisfy Petitioner's standards of ability and merit.

In reviewing the trial court's decision, it is further important to remember that Plaintiff's case was not limited to statistical proof. For instance, the trial court made findings of overt acts of discrimination reflecting active bias against potential black managers.[5] The trial court further found *inter alia* that racial slurs were periodically directed at Petitioner's black employees (Finding No. 58, App. B),

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[5] The trial court specifically found that in March of 1976 the plant Manager at Petitioner's Dallas plant stated that the white employees would have to approve whomever was selected as the first black supervisor (Finding No. 27, Appendix B to the Petition).

that Petitioner's upper management made racial slurs (Finding No. 57(e) App. B) the discriminatory assignment of black employees to the undesirable job of slide handler (Findings No. 54-56, App. B) and that during the pendency of this suit Petitioner's management viewed blacks as inferior to whites (Finding No. 57, App. B). The probative force of such nonstatistical evidence to strengthen the inference of discrimination arising from Plaintiff's statistical proof is well settled. *Teamsters v. United States*, 431 U.S. 324.

Thus unlike the lower courts in *Hazelwood v. United States*, 433 U.S. 299, here the trial court did consider the explanations offered by Petitioner, but concluded that Plaintiff had established class-based racial discrimination by a preponderence of all the credible evidence (Appendix B to the Petition).

BECAUSE OF THE UNUSUAL FACTS, THIS CASE HAS SLIGHT PRECEDENT VALUE

Petitioner's expressed concern that the decision of the Fifth Circuit if undisturbed, will discourage employers from undertaking voluntary affirmative action to ameliorate past racial imbalances in their workforces is unwarranted. A careful reading of the decisions rendered by both the trial court and the Appellate Court will show that Petitioner has not been enjoined from continuing the use of Total Assessment in awarding promotions to mechanical and lab analyst positions. To the contrary, both Courts recognized the positive potential which total assessment offered to the class of black employees. The single aspect of total Assessment which the trial court found objectionable

was its extensive subjectivity coupled with the total absence of black supervisors and the evidence of overt racist attitudes on the part of the white supervisors and managers. Thus, Petitioner may continue to use its present total assessment programs in making promotions to mechanical, lab analyst, and possible management positions by simply eliminating the absence of black supervisors at its Dallas plant and taking reasonable measures to counter the remaining unfortunate racist attitudes on the part of the management of the Dallas plant.

Petitioner indicates that as a result of this decision, it will be compelled to base its promotional decisions strictly on seniority to the ultimate harm of the Plaintiff class. To place matters in perspective, however, it is important to note that the Company has never based promotions to those positions it deems as critical on the sole basis of seniority. Before the fairly recent institution of total assessment, Petitioner utilized certain tests to determine relative ability and merit. However, testing and seniority were not the sole determinant factors. Since senior applicants scoring in the acceptable range or higher were at times bypassed for promotion and at times senior applicants with less than acceptable scores were, in fact, promoted. Thus at all times the Company has utilized various subjective factors to supplement the objective testing of ability and merit. Viewed in this context, the decision below will have minimum impact upon the Company's legitimate affirmative action efforts.

CONCLUSION

The decisions of the lower courts in this case are consistent with the decisions of this Court and present no matter which requires a determination by this Court. Accordingly, Respondent urges that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

Philip I. Palmer, Jr., of the firm of
PALMER, PALMER, COFFEE & BUSH
840 One Main Place
Dallas, Texas 75250
(214) 748-1211

ATTORNEYS FOR THE RESPONDENT

CERTIFICATE

This is to certify that a copy of Brief of Respondent in Opposition was this, the 28th day of October, 1980, served upon Erwin N. Griswold by mailing the same to him at 1735 Eye Street N.W., Washington, D. C. 20006.

PHILIP I PALMER, JR.

No. 80-474

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE PROCTER & GAMBLE MANUFACTURING COMPANY,
Petitioner,

VS.

DENNIS FISHER,
Respondent.

On Petition for a Writ of Certiorari
For the United States Court of Appeals
For the Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-474

THE PROCTER & GAMBLE MANUFACTURING COMPANY,
Petitioner,

vs.

DENNIS FISHER,
Respondent,

On Petition for a Writ to Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR THE PETITIONER

The essential fact in this case is that both courts below have failed to apply both the Act of Congress authorizing bona fide seniority systems, and this Court's decisions in *Teamsters* v. *United States,* 431 U.S. 324, and in *United Air Lines* v. *Evans,* 431 U.S. 553. The district court decided the case below before *Teamsters* and *Evans* were decided. The court of appeals acknowledged *Teamsters* and *Evans,* but then clearly failed to apply those decisions. This alone is sufficient to require the grant of the petition and the reversal of the judgment below.

In its Brief in Opposition, the respondent's main contention is that workforce statistics may be sufficient to constitute *prima facie* proof of discrimination. The petitioner recognized its burden to show that "the claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination" pursuant to *Teamsters,* 431 U.S. at 360, or of hiring before the statute of limitations period under *Evans.* The error of the courts below was that they failed to consider the evidence that the plaintiff's data, "snapshot" statistics based on a single moment of time, were the result of pre-Act hiring, and time-barred promotion decisions under a bona fide seniority system. What the evidence really shows is that the practices of the petitioner constituted a substantial voluntary affirmative action program, which will be imperiled if the decision below stands.

The basic difficulty with the respondent's contention that the petitioner merely failed to carry its burden of explanation is that it has no relationship to the proceedings or holdings below.

1. The impact of the company's bona fide seniority system on the snapshot statistics used by the courts below was never properly considered by either court.

The district court erroneously found that the seniority system was not bona fide, and thus had no occasion to consider evidence which "factored out" the effect of bona fide seniority from the effect of other challenged practices. Although the company did submit evidence on this point the court made no findings or conclusions on the impact of the company's practices exclusive of seniority. Petition at 8-9, 20-21.[1]

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[1] It is therefore somewhat puzzling that respondents can assert that "Thus unlike the lower courts in *Hazelwood* v. *United States,* 433 U.S. 299, here the trial court did consider the explanations offered by Petitioner, but concluded that Plaintiff had established class-based racial discrimination by a preponderance of all the credible evidence." Br. in Opp. at 7.

Although the court of appeals found that the seniority system was bona fide, it nonetheless relied completely on the same snapshot statistics which the district court used.[2] In its ruling in favor of the respondent, the court of appeals found "active discrimination" based on the "disparate impact" of the Company's promotional policies on blacks. But the finding of "disparate impact" cannot stand, for it was based exclusively on the "snapshot" of workforce statistics on the date of trial (Petition at 10-11), a method which inevitably disregards the effect of the petitioner's bona fide seniority system, contrary to this Court's decision in *Teamsters.*

The court of appeals below simply ignored the fact that the statistics reflecting employment on a particular day were necessarily affected by the operation of a bona fide seniority system, where whites had as a group greater seniority than blacks. (Petition at 16-17.) The respondent does not contend that the court of appeals gave any consideration to the extent to which the crucial workforce figures may have reflected time-barred discrimination and bona fide seniority. (*See* Petition at 19-21.) The respondent does not and cannot cite any conclusion of the court of appeals supporting the respondent's apparent contention that the decision below was based on the petitioner's failure to factor out the effects of neutral elements such as the Company's seniority system. Br. in Opp. at 6. Contrary to the

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[2] The respondents point to specific incidents which they maintain corroborate the trial court's inference of discrimination. Br. in Opp. at 6-7. The court of appeals cited these alleged incidents only in relationship to the total assessment issue, referring to them in a footnote beginning "The court also considered . . ." (App. A at 31a, n.35.) The court of appeals went on to conclude that the "significant underrepresentation of blacks in supervisory level management positions" was "an adequate basis" to invalidate total assessment. App. A at 32a.

decisions in *General Motors,*[3] and *Aero Lodge,*[4] as well as *Teamsters,* the court of appeals merely ignored the impact of bona fide seniority, and gave conclusive effect to "snapshot" workforce statistics.

2. No adverse impact was shown for *any* specific challenged promotion practice, and respondent cites none. (See Petition at 16-17.) The respondent restricts himself to an argument that the petitioner's proof did not exclude every possible way in which adverse impact might have been shown. (Br. in Opp. at 6.) When the record is examined, it is clear that no linkage between the challenged practices and the workforce statistics used to discredit them was ever established. (Petition at 10-11, 16-17.)

3. The respondent contends that the decision below will have little impact either on Procter & Gamble or on Title VII because the holding was limited and the facts were unusual. The asserted "peculiarity" of the facts does not limit the impact of the decision below on the basic recurring issues of bona fide seniority, snapshot statistics, or the appropriate size and construction of a statistical showing. What makes the case peculiar is how the precedents have been stretched to accommodate it, and that makes the case more rather than less important. Moreover, the potential impact of the decision below is clearly shown by the fact that it has already been cited as authority in at least three cases decided in the last four months: *Johnson* v. *Uncle Ben's, Inc.*, 24 FEP Cases 1 (5th Cir. 1980); *Falcon* v. *General Telephone Co. of S.W.*, 626 F.2d 369, 380 (5th Cir. 1980); *Wells* v. *Hutchinson,* No. TY-75-69-CA (E.D. Tex., August 25, 1980).

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[3] *Movement for Opportunity & Equality* v. *General Motors Corp.* 622 F.2d 1235 (7th Cir. 1980) cited in Petition at 19-20, 21, 24.

[4] *Alexander* v. *Aero Lodge No. 735,* 565 F.2d 1364 (6th Cir. 1977), *cert denied,* 436 U.S. 946, cited in Petition at 21.

The respondent's contentions about the impact on the petitioner illustrate rather than dispel the practical uncertainty which the decision creates. Noting a "legacy" of past discrimination, and acknowledging recent company steps to better the condition of blacks at the Dallas plant, the respondent goes on to say that the trial court found that the Company's "voluntary actions had not been *completely effective* and enjoined the Company to take additional measures under court supervision." (Br. in Opp. at 2; emphasis added.) What this amounts to is a contention that the Company is required to be "completely effective" in compensating for the effects of its bona fide seniority system, and time-barred decisions, in order to avoid liability. Thus, if the decision below is permitted to stand, the operation of this court's decisions in *Teamsters* and in *Evans* is neatly eliminated.

In attempting to make specific what the Company (and presumably other companies) would be required to do in order to comply with the decision below, the respondent recommends "eliminating the absence of black supervisors at its Dallas plant and taking reasonable measures to counter the remaining unfortunate racist attitudes on the part of the management of the Dallas plant." (Br. in Opp. at 8.) Aside from the uncertain nature of what this advice would require in practice, and aside from its uncertain grounding in the opinion it purports to interpret (there is no citation), the respondent fails to indicate how or why a company is to remedy workforce statistics which are the result of bona fide seniority and time-barred actions.

CONCLUSION

This case is important because there are many companies who need to know (1) their legal responsibilities with respect to the composition of their workforce, (2) the degree of protection which a bona fide seniority system provides, and (3) the affirmative steps which may be taken to increase minority opportunity without increasing exposure to Title VII liability.

Likewise the courts which are called on to apply Title VII should be instructed as to how to assess the impact of bona fide seniority and how to evaluate statistical showings such as the one put forth below.[5]

For these reasons, and for reasons advanced in the petition, certiorari should be granted.

Respectfully submitted,

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[5] The respondent illustrates the problem of interpretation in footnote 1 on page 4 of the Brief in Opposition where the argument seems to be that any explanation for racially disparate results—presumably even including an explanation based on bona fide seniority—must be supported by a showing of business necessity. This result would, of course, be totally inconsistent with both Section 703(h) and with this Court's clear decision in *Teamsters*.